

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

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**MOTION RECORD OF THE MOVING PARTY,  
THE DEFENDANT**  
(Appeal to a Judge from Prothonotary's order, Rule 51)

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Dated: January 17, 2014

**DR. JEREMY COOPERSTOCK**  
392 Grosvenor Avenue  
Westmount, Québec H3Z 2M2  
Tel: (438) 808-6463

*jcooperstock@gmail.com*

Defendant / Moving Party

TO: **GOWLING LAFLEUR HENDERSON LLP**  
1 Place Ville Marie, 37th Floor  
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**Solicitor for the Plaintiff,  
United Airlines, Inc.**

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Court File No.: T-2084-12

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

**NOTICE OF MOTION**

**TAKE NOTICE THAT** Dr. Jeremy Cooperstock will make a motion in writing to a Judge of the Court under Rules 51 and 369 of the *Federal Court Rules*, S.O.R./98-106.

**THE MOTION IS FOR:**

1. an Order striking out paragraphs (h) and 31 of the amended statement of claim;
2. an Order awarding costs thrown away to the defendant;
3. an Order awarding costs of this motion to the defendant;

4. an Order pursuant to Rule 51 setting aside the the January 3, 2014 Order of Prothonotary Morneau refusing to strike out paragraphs (h) and 31 of the amended statement of claim, and refusing to award the defendant costs thrown away; and
5. such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

6. The plaintiff has abandoned/withdrawn paragraph (h) of its amended statement of claim, which also renders paragraph 31 of the statement of claim irrelevant;
7. The defendant sought to have the abandoned/withdraw claims struck from the amended statement of claim;
8. In refusing to strike out the abandoned/withdrawn claims and in refusing to award the defendant costs thrown away, Prothonotary Morneau:
  - (a) made an error of law;
  - (b) made his decision without having the transcripts of the discoveries before him; and
  - (c) failed to provide reasons that would permit review of his decision.
9. Rules 51, 181, 182, 221, 369, and 402 of the *Federal Court Rules*, S.O.R./98-106.
10. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used for the motion:

11. Affidavit of Dr. Jeremy Cooperstock, affirmed on January 17, 2014.

January 17, 2014



**DR. JEREMY COOPERSTOCK**

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Defendant / Moving Party

TO: **GOWLING LAFLEUR HENDERSON LLP**

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**Solicitor for the Plaintiff,  
United Airlines, Inc.**



Federal Court



Cour fédérale

Date: 20140103

Docket: T-2084-12

Montréal, Quebec, January 3, 2014

**PRESENT: Richard Morneau, Esq., Prothonotary****BETWEEN:****UNITED AIRLINES, INC.****Plaintiff****and****JEREMY COOPERSTOCK****Defendant****ORDER**

This order is further to the letter from the defendant dated December 13, 2013 and the correspondence thereafter from both parties.

With respect to the request from the defendant that the plaintiff proceeds to amend its statement of claim to address the fact that it no longer seeks monetary compensation, I am satisfied with the plaintiff's approach and position as expressed in its letter dated December 17, 2013. Consequently, there is no need for an amendment to the plaintiff's statement of claim.

In addition, the plaintiff shall not be subjected to costs thrown away since the Court accepts that it is the conduct and the answers provided during the discovery of the defendant that led the plaintiff not to seek further damages under its claim.

As to the plaintiff's chart of refusals and the request that the defendant be provided with the plaintiff's original file format of said document, since it appears that the PDF version provided by the plaintiff is of no practical use to the defendant, and since it appears that the metadata can be removed from the plaintiff's document, as explained by the defendant in his letter dated December 18, 2013, the Court would require here the plaintiff to engage in the exercise to remove the metadata so as to provide a *Word* format document to the defendant on or before January 15, 2014.

**“Richard Morneau”**

---

Prothonotary

**FEDERAL COURT**

**BETWEEN:                    ~~UNITED AIR LINES~~ AIRLINES, INC. and**  
**~~— CONTINENTAL AIRLINES, INC.~~**

**Plaintiffs**  
**Plaintiff**

**AND**

**JEREMY COOPERSTOCK**

**Defendant**

**AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the Plaintiff's<sup>2</sup> solicitor or, where the Plaintiffs does not have a solicitor, serve it on the Plaintiffs, and file it, with proof of service, at a local office of this Court, **WITHIN 30 DAYS** after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: November 19, 2012  
Amended April    •    , 2013

Issued by:

\_\_\_\_\_  
 (Registry Officer)  
 30 McGill Street  
 Montreal, Quebec  
 H2Y 3Z7

To: PROFESSOR JEREMY COOPERSTOCK  
392 Grosvenor Street  
Westmount  
Quebec  
H3Z 2M2

The Plaintiff, United Airlines, Inc. claims: ~~Plaintiffs, United Air Lines, Inc. (hereinafter called "United") and Continental Airlines Inc. (hereinafter called "Continental") (United and Continental hereinafter collectively called the "Plaintiffs")~~ claim,

- (a) a declaration that ~~Continental~~ the Plaintiff is the owner of the copyright in Canada in the graphic design elements, including layout, incorporated in the website corresponding with the internet domain name www.united.com (these graphic design elements and layout are hereinafter collectively called the "United Website");

- (b) a declaration that the ~~Plaintiffs are~~ Plaintiff is the ~~owners~~ owner of the copyright in Canada in the logo: **UNITED**

(hereinafter called the "United Logo");

- (c) a declaration that ~~Continental~~ the Plaintiff is the owner of the copyright in Canada in the logo:



(hereinafter called the "Globe Design");

- (d) a declaration that United the Plaintiff is the owner of the Canadian registered trade-marks UNITED, GLOBE DESIGN and UNITED AIRLINES bearing trade-mark registration nos. TMA204,456, TMA492,886 and TMA367,179, respectively (collectively hereinafter called the "United Trade-marks"); (e) ~~a declaration that Continental is the owner of the Canadian registered trade mark GLOBE DESIGN bearing trade mark registration no. TMA492,886 (this trade mark and the United Trade marks hereinafter collectively called the "Plaintiffs' Plaintiff's Trade-marks")~~;

- (f) a declaration that the Defendant, Professor Jeremy Cooperstock (hereinafter called the "Defendant"), has:
- (i) infringed the ~~Plaintiffs'~~ Plaintiff's copyrights in the United Website, in the United Logo and in the Globe Design;
  - (ii) directed public attention to his wares, services, and business in such a way as to cause or be likely to cause confusion in Canada between them and the wares, services and business of the ~~Plaintiffs~~ Plaintiff;
  - (iii) infringed the ~~Plaintiffs'~~ Plaintiff's rights in the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
  - (iv) used the ~~Plaintiffs'~~ Plaintiff's Trade-marks in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto; and
  - (v) caused confusion to the public and ongoing damage to the ~~Plaintiffs~~ Plaintiff, including depreciation of the ~~Plaintiffs'~~ Plaintiff's goodwill in the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
- (g) an interim, interlocutory and permanent injunction restraining the Defendant from, either directly or indirectly, further infringing the ~~Plaintiffs'~~ Plaintiff's said copyrights and from further directing public attention to his wares, services and business in a confusing manner as set out above, and, in particular, from using or displaying, on the internet or in any other way, the ~~Plaintiffs'~~ Plaintiff's Trade-marks or any symbols, logos, words or indicia which cause or are likely to cause confusion with any of the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
- (h) damages, profits and statutory damages, or whichever one or more of those that the ~~Plaintiffs~~ Plaintiff may elect after due inquiry; and
- (i) such further and other relief as to this Honourable Court shall seem just.

The ~~Plaintiffs are~~ Plaintiff is not seeking to prevent the Defendant from operating a website where individuals can express their views about ~~Plaintiffs~~ the Plaintiff. Rather, ~~Plaintiffs are~~ the Plaintiff is requesting the relief above in order to protect ~~their~~ its intellectual property rights and prevent consumer confusion over whether ~~Plaintiffs own~~

the Plaintiff owns and/or ~~spenser~~ sponsors Defendant's UNTIED.com website. As set out in paragraphs 19, 21, and 23 below, ~~Plaintiffs~~ the Plaintiff approached Defendant on multiple occasions with a request that Defendant modify his website so that it is not confusingly similar to the United Website. The Defendant refused to do so. Accordingly, ~~United~~ the Plaintiff is left with no reasonable option but seek relief from this Court.

### **The Parties**

1. Plaintiff, ~~United Air Lines~~ Airlines, Inc., is a corporation incorporated and existing under the laws of the State of Delaware, one of the United States of America, having a principal place of business at ~~77 West~~ 233 South Wacker Dr., Chicago, Illinois ~~60601~~ 60606, U.S.A.
2. The Plaintiff, is the result of the merger of United Air Lines, Inc. ("United") and Continental Airlines, Inc., is a corporation incorporated and existing under the laws of the State of Delaware, one of the United States of America, having a principal place of business at 77 West Wacker Dr., Chicago, Illinois 60601, U.S.A. ("Continental"), which merger took effect on March 31, 2013.
3. The Plaintiffs operate Prior to the March 31, 2013 merger, United and Continental had operated commercial flights under a single operating certificate and ~~market~~ marketed such flights as "United".
4. For over eighty years, ~~United~~ the Plaintiff, together with its successors in interest, has been one of the largest commercial airline operators and transportation service providers in the world. Indeed, ~~United~~ the Plaintiff (together with United Express) operates an average of 5,557 flights a day to 378 airports on six continents. The Plaintiff ~~United~~ was rated the world's most admired airline on FORTUNE magazine's 2012 airline-industry list of the World's Most Admired Companies. In addition, readers of Global Traveler magazine have voted ~~United's~~ the Plaintiff's MileagePlus program the best frequent flyer program for eight consecutive years.

5. ~~The Plaintiff~~ United and its predecessors in interest have been offering airline related services in Canada for over 70 years. In 2011, ~~United~~ the Plaintiff operated more than 2 million flights and carried approximately 142 million passengers to destinations around the world. ~~United~~ the Plaintiff employs more than 85,000 people worldwide.
6. The Defendant is an individual having an office at McGill University, McConnell Engineering Building, Rm. 424, 3480 University Street, Montreal, Quebec, H3A 0E9, and residing at 392 Grosvenor Street, Westmount, Quebec, H3Z 2M2.
7. The Defendant owns and operates a website corresponding with the internet domain name www.untied.com (this website hereinafter called "UNTIED.com"). Defendant registered this domain name on April 24, 1997. The Defendant began operating said website on the following day.

#### **The United Copyright Works**

8. ~~Plaintiffs are~~ The Plaintiff is the owners owner of all rights, including copyright, in the United Website the United Logo, and the Globe Design.
9. ~~Plaintiffs~~ The Plaintiff's predecessors in title have obtained copyright registrations in Canada under the numbers 1099767, 1099766 and 1099765 for the United Website, the United Logo and the Globe Design, respectively. Appended as Schedule "A" to form an integral part of the present action is a copy of each registration.
10. The United Website was first published in Canada when it was launched in its current form on or about March 3, 2012. This launch was the result of a significant redesign of the previous version of the website www.united.com and is based upon the version of the website that existed at www.continental.com.

#### **The United Trade-marks**

11. ~~Plaintiffs~~ The Plaintiff and ~~their~~ its predecessors in interest have used the trade-marks UNITED and UNITED AIRLINES in Canada in association with, inter



alia, air transportation of passengers since at least as early as 1939. These two trade-marks have been registered with the Canadian Trade-marks Office under registration nos. TMA204,456 and TMA367,179, respectively.

12. ~~Plaintiffs~~ The Plaintiff and ~~their~~ its predecessors in interest have used the trade-mark GLOBE DESIGN in Canada in association with, inter alia, airline transportation services for passengers since at least as early as June 22, 1995. More specifically, ~~Plaintiff~~ Continental previously used the trade-mark GLOBE DESIGN in association with Continental-branded flights; ~~it~~ the Plaintiff now uses this trade-mark in association with United-branded flights. This trade-mark has been registered with the Canadian Trade-marks Office under registration no. TMA492,886. Appended as Schedule "B" to form integral part of the present action are copies of the ~~Plaintiffs'~~ Plaintiff's Trade-mark registrations 204,456, 367,179 and 492,886.
13. The ~~Plaintiffs~~ Plaintiff and ~~their~~ its predecessors in ~~title have~~ interest have used the ~~Plaintiffs'~~ Plaintiff's Trade-marks extensively in Canada, and the ~~Plaintiffs have~~ Plaintiff has established a very valuable reputation and goodwill in association with the ~~Plaintiffs'~~ Plaintiff's Trade-marks.
14. To enable ~~their~~ its customers, and the general public, to readily associate the United Website with ~~United~~ the Plaintiff, the ~~Plaintiffs~~ Plaintiff prominently display the ~~Plaintiffs'~~ Plaintiff's Trade-marks on the United Website.

#### **The Defendant's Acts**

15. At some time between March 3, 2012 and April 9, 2012, the Defendant caused UNTIED.com to be redesigned. The newly designed UNTIED.com site very closely resembles the recently redesigned United Website. Amongst other things, the colour scheme, font, general website layout, and prominent placement of the logo , which is confusingly similar with the United Logo and the Globe Design, are all nearly exactly the same on both the United Website and the new version of UNTIED.com. All of the ~~Plaintiffs'~~ Plaintiff's Trade-marks, and/or indicia

confusingly similar therewith, appear on the redesigned version of UNTIED.com. This results in UNTIED.com having an overall appearance which very closely resembles and is difficult to distinguish from that of the United Website.

16. UNTIED.com allows visitors to the site to submit complaints. For at least one visitor, the Defendant assigned an Untied.com complaint number to the visitor's complaint and instructed the visitor to use the complaint number in correspondence with United the Plaintiff. However, since United the Plaintiff does not operate UNTIED.com, it did not receive this visitor's complaint and did not assign a complaint number to the visitor. As a result, the visitor subsequently contacted United the Plaintiff, noted that he had registered an online complaint via UNTIED.com, but he had not received a response from United the Plaintiff. This example is one of many situations where customers have evidenced confusion between the United Website and UNTIED.com.
  
17. A link on the UNTIED.com website, which link was removed following the filing of the Plaintiff's November 19, 2012 Statement of Claim, also served to divert ~~diverts~~ users to the commercial website [www.inweddingdress.com](http://www.inweddingdress.com), which advertises and sells wedding dresses and related clothing and accessories. Additionally, the June 15, 2012 version of the UNTIED.com website was also linked to the commercial website [www.uspassportnow.com](http://www.uspassportnow.com), an online passport agency. A further link on UNTIED.com directs visitors to a page which offers users the opportunity to send money to the Defendant, either electronically, either electronically ~~to the account corresponding with the Defendant's personal university email address~~, or by cheque. At the time of filing of the Plaintiff's November 19, 2012 Statement of Claim, the Defendant had encouraged users to send money electronically to an account corresponding with the Defendant's personal university email address, which address has since been removed. Defendant expressly states on his website that donations "serve primarily as a means of encouragement."

18. During or about April of 2012, ~~Plaintiffs~~ the Plaintiff became aware of the strong resemblance between its recently launched United Website and the then-recently redesigned UNTIED.com.
19. On July 16, 2012, ~~United~~ the Plaintiff contacted the Defendant to request, among other things, that the appearance of UNTIED.com be altered so as to alleviate the possibility of confusion between UNTIED.com and the United Website.
20. On July 17, 2012, the Defendant acknowledged receipt of ~~United's~~ the Plaintiff's request, and stated that he would "study" ~~United's~~ the Plaintiff's concerns. At that time, and instead of addressing the specific requests made by ~~United~~ the Plaintiff, the Defendant also offered his services to ~~United~~ the Plaintiff "on a consultancy basis."
21. On September 10, 2012, ~~United~~ the Plaintiff again contacted the Defendant to reiterate its earlier request that the Defendant alter the appearance of UNTIED.com, and to formally put the Defendant on notice of ~~United-the~~ Plaintiff's rights. Appended as Schedule "C" is a copy of the September 10, 2012 letter. Specifically, ~~United~~ the Plaintiff stated:

Given the use of United Airlines' trade dress and its copyrighted and trademarked materials, and the intermingling of the untied.com and united.com websites caused by your linking to web pages within the united.com site, it is not surprising that we have received several reports of individuals who have accessed and used your untied.com website, believing that they were on a website owned and/or sponsored by United Airlines. Such individuals have submitted statements or complaints through your website, believing they were being submitted directly to United Airlines. As a result of the confusion caused by your website, the communications from these customers to United Airlines have been delayed, or sometimes even lost. In addition, the amount of time between when these customers thought they were communicating with United Airlines and the time when they actually began communicating with United Airlines has been delayed to their detriment.

22. On September 25, 2012, the Defendant responded to ~~United~~ the Plaintiff's September 10, 2012 letter but did not address ~~United~~ the Plaintiff's request that the Defendant alter the appearance of UNTIED.com.
23. On October 2, 2012, ~~United~~ the Plaintiff once again contacted the Defendant to reiterate its earlier request that the Defendant alter the appearance of UNTIED.com. Appended as Schedule "D" is a copy of the October 2, 2012 letter. Specifically, ~~United~~ the Plaintiff stated:
 

[T]he design of your untied.com site closely mimics the design of United Airlines' united.com website down to color, font, and location of active links. United Airlines' customers have experienced a great deal of confusion due to the very similar look and feel of your untied.com site and United Airlines' united.com site. Additionally, communications submitted by United Airlines' customers via untied.com are sometimes lost or not directed through the appropriate channels, thus impeding the communication flow between United Airlines and its customers. As a result, we remain concerned about your use of United Airlines' trade dress and copyrighted and trademarked materials on your site.
24. On October 12, 2012, the Defendant responded to ~~United's~~ the Plaintiff's October 2, 2012 letter but once again did not address ~~United's~~ the Plaintiff's request that the Defendant alter the appearance of UNTIED.com.
25. To date, the Defendant has not altered the overall visual appearance of UNTIED.com, or removed any of the indicia which are confusing with or identical to ~~Plaintiffs'~~ the Plaintiff's Trade-marks and the United Logo and Globe Design.
26. The Defendant's aforesaid acts were performed without the ~~Plaintiffs'~~ Plaintiff's authorization, consent, license, or acquiescence to same.

### **Copyright Infringement**

27. By the actions set out in paragraphs 15 to 26, the Defendant has infringed the ~~Plaintiffs'~~ Plaintiff's copyrights in the United Website and the United Logo and Globe Design.
28. The Defendant, by reason of his aforesaid activities, has infringed the copyright in the works owned by the ~~Plaintiffs~~ Plaintiff in that he has produced or reproduced, caused to be produced or reproduced, or authorized the production, reproduction or adaptation of the ~~Plaintiffs'~~ Plaintiff's protected works, or a substantial part thereof, contrary to section 3 and 27 of the *Copyright Act*.

#### **Trade-mark Infringement and Passing Off**

29. The Defendant, by reason of his aforesaid activities, has infringed the ~~Plaintiffs'~~ Plaintiff's rights in the ~~Plaintiffs'~~ Plaintiff's Trade-marks, in a manner that has had, or is likely to have, the effect of depreciating the value of the goodwill attaching to the ~~Plaintiffs'~~ Plaintiff's Trade-marks, the whole contrary to sections 19, 20(1) and 22(1) of the *Trade-marks Act*. Also by these actions, the Defendant has directed public attention to his wares, services or business in such a way as to have caused, or to be likely to cause, confusion in Canada between his wares, services or business and the wares, services or business of the ~~Plaintiffs~~ Plaintiff, the whole contrary to section 7(b) of the *Trade-marks Act*.
30. The Defendant is likely to continue the aforesaid illegal and infringing acts, the whole to the prejudice of the ~~Plaintiffs~~ Plaintiff and the public, as aforesaid, unless restrained by Order of this Honourable Court.
31. By reason of the Defendant's aforesaid activities, the ~~Plaintiffs have~~ Plaintiff has suffered and ~~continue~~ continues to suffer considerable damages whereas the Defendant has made and continues to make illegal profits.
32. The present action is well founded in fact and law.

The ~~Plaintiffs propose~~ Plaintiff proposes that this action be tried in Montreal.

Montreal, this 19<sup>th</sup> day of November, 2012.

Amended April • 2013

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Gowling Lafleur Henderson LLP  
Solicitors for the ~~Plaintiffs~~ Plaintiff  
1 Place Ville Marie, 37<sup>th</sup> Floor  
Montreal, Québec, Canada, H3B 3P4

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**Schedule "A"**



Office de la propriété  
intellectuelle  
du Canada

Un organisme  
d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

20

*Certificate of Registration of*

# *Copyright*

*Certificat d'enregistrement du*

# *Droit d'auteur*

*This Certificate of Registration is issued pursuant to sections 49 and 53 of the Copyright Act. The copyright in the work described below was registered on the date of registration as follows:*

*Ce certificat d'enregistrement est émis conformément aux articles 49 et 53 de la Loi sur le droit d'auteur. Le droit d'auteur sur l'oeuvre décrite ci-dessous, a été enregistré à la date d'enregistrement comme suit :*

*Date of Registration - Date d'enregistrement :*

**October 29, 2012**

*Registration No. - Numéro d'enregistrement*

**1099765**

*First Publication - Première publication :*

**February 1, 1991**

**Houston, Texas, United States of America**

*Title - Titre :*

**Globe design**

*Category - Catégorie :*

**Artistic**

*Owner(s) - Titulaire(s) :*

**Continental Airlines, Inc.  
1600 Smith Street  
Houston, Texas  
United States of America, 77002**

*Author(s) - Auteur(s) :*

**Steven Gilliat**

**Roger van den Bergh**

**Connie Birdsall**

**Canada**

(CIPO 00200)  
03-11

OPIC  CIPO





Office de la propriété  
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du Canada

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d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

21

*Date of Issuance of Certificate - Date d'émission du certificat :*

**October 29, 2012**

Registrar of Copyright  
Copyright office

Registraire des droits d'auteur  
Bureau du droit d'auteur



1099765

Canada

(CIPO 00200)  
03-11

OPIC  CIPO



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du Canada

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d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

22

*Certificate of Registration of  
Copyright*

*Certificat d'enregistrement du  
Droit d'auteur*

*This Certificate of Registration is issued pursuant to sections 49 and 53 of the Copyright Act. The copyright in the work described below was registered on the date of registration as follows:*

*Ce certificat d'enregistrement est émis conformément aux articles 49 et 53 de la Loi sur le droit d'auteur. Le droit d'auteur sur l'oeuvre décrite ci-dessous, a été enregistré à la date d'enregistrement comme suit.*

*Date of Registration - Date d'enregistrement :* **October 29, 2012**

*Registration No. - Numéro d'enregistrement :* **1099766**

*First Publication - Première publication :* **August 11, 2010  
Houston, Texas, United States of America**

*Title - Titre :* **United logotype**

*Category - Catégorie :* **Artistic**

*Owner(s) - Titulaire(s) :* **United Air Lines, Inc.  
77 W. Wacker Drive  
Chicago, Illinois  
United States of America, 60601**

**Continental Airlines, Inc.  
1600 Smith Street  
Houston, Texas  
United States of America, 77002**

*Author(s) - Auteur(s) :* **Su Mathews**

**Connie Birdsall**

Canada

(CIPQ 00200)  
03-11

OPIC  CIPO



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du Canada

Un organisme  
d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

23

*Date of Issuance of Certificate - Date d'émission du certificat :*

**October 29, 2012**

Registrar of Copyright  
Copyright office

Registraire des droits d'auteur  
Bureau du droit d'auteur



1099766

Canada

(CIPO 00200)  
03-11

OPIC  CIPO



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du Canada

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d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

24

*Certificate of Registration of*  
**Copyright**

*Certificat d'enregistrement du*  
**Droit d'auteur**

*This Certificate of Registration is issued pursuant to sections 49 and 53 of the Copyright Act. The copyright in the work described below was registered on the date of registration as follows:*

*Ce certificat d'enregistrement est émis conformément aux articles 49 et 53 de la Loi sur le droit d'auteur. Le droit d'auteur sur l'oeuvre décrite ci-dessous, a été enregistré à la date d'enregistrement comme suit :*

*Date of Registration - Date d'enregistrement :* **October 29, 2012**

*Registration No. - Numéro d'enregistrement :* **1099767**

*First Publication - Première publication :* **July 29, 2006**  
**Houston, Texas; United States of America**

*Title - Titre :* **INTERNET WEBSITE CONTENT  
INCLUDING, WITHOUT LIMITATION:  
(TEXT, IMAGES, DESIGNS, LAYOUT,  
FONT COLOUR SELECTION) AT  
DOMAIN : WWW.united.com**

*Category - Catégorie :* **Artistic**

*Owner(s) - Titulaire(s) :* **Continental Airlines, Inc.  
1600 Smith Street  
Houston, Texas  
United States of America, 77002**

*Author(s) - Auteur(s) :* **Michael Van Auken**  
**Kathryn Van Auken**  
**Aaron Hynes**  
**Nora Bush**

**Canada**

(CIP0 00200)  
03-11

OPIC  CIPO



Office de la propriété  
intellectuelle  
du Canada

Un organisme  
d'Industrie Canada

Canadian  
Intellectual Property  
Office

An Agency of  
Industry Canada

25

**Michelle Bottomley**

*Date of Issuance of Certificate - Date d'émission du certificat :*

**October 29, 2012**

Registrar of Copyright  
Copyright office

Registraire des droits d'auteur  
Bureau du droit d'auteur



1099767

Canada

(CIPO 00200)  
03-11

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**Schedule "B"**



*Marques de commerce*  
*Certificat d'authenticité*

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 204,456 conformément à la Loi sur les marques de commerce.

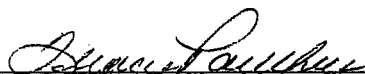
Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

*Trade-marks*  
*Certificate of Authenticity*

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 204,456 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

UNITED

  
Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

Canada

(CIPO 00200)  
03-11

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## *Marques de commerce*

### *Certificat d'authenticité*

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 367,179 conformément à la Loi sur les marques de commerce.

Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

## *Trade-marks*

### *Certificate of Authenticity*

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 367,179 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

**UNITED AIRLINES**


  
Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

**Canada**

(CIP0 00200)  
03-11

OPIC  CIPO





*Marques de commerce*  
*Certificat d'authenticité*

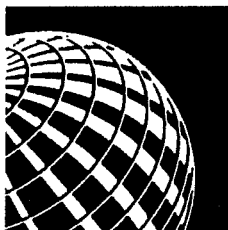
Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 492,886 conformément à la Loi sur les marques de commerce.

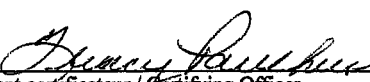
Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

*Trade-marks*  
*Certificate of Authenticity*

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 492,886 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.



  
Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

Canada

(CIPO 00200)  
03-11

OPIC  CIPO

**Schedule “C”**

UNITED



Michael C. Henning  
Managing Counsel - Litigation & Intellectual Property  
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(713) 324-5161 (fax)  
mike.henning@united.com

15th Floor HQSLG  
1600 Smith Street  
Houston, Texas 77002  
united.com

September 10, 2012

**VIA E-MAIL**

*Without Prejudice*

Jeremy Cooperstock  
McGill University  
McConnell Engineering Building, Rm 424  
3480 rue University  
Montreal H3A 0E9 Quebec  
CANADA  
[jcooperstock@gmail.com](mailto:jcooperstock@gmail.com)

Re: untied.com

Dear Professor Cooperstock:

I write as a follow up to our earlier communications. As you know, I am one of United Airlines' in-house attorneys. The purpose of this letter is to continue our discussion about two issues that exist with respect to your untied.com website in hopes of getting them resolved.

To be clear, United Airlines is in no way suggesting by this letter that you may not criticize United Airlines and maintain a website on which such criticisms are collected and posted. While United Airlines certainly believes that there are far more productive ways to address the concerns raised on your website, the purpose of this letter is not to ask you to take down the untied.com site. Rather, it is to see if we can reach an agreement to resolve two specific problems that your website has created for United Airlines' customers and its employees.

The first issue concerns the actual confusion and likelihood of confusion that results from the current layout and appearance of the web pages presented by the untied.com website. As I am sure you know, the overall look and feel of the website you established at untied.com mimics the United Airlines website at the united.com site down to color, font, and location of active links. The untied.com website is also intermingled with the united.com website in that pages provided by the untied.com site include links that take one directly to pages on the united.com website.

Given the use of United Airlines' trade dress and its copyrighted and trademarked materials, and the intermingling of the untied.com and united.com websites caused by your linking to web pages within the united.com site, it is not surprising that we have received several reports of individuals who have accessed and used your untied.com website, believing that they

September 10, 2012  
Page 2



were on a website owned and/or sponsored by United Airlines. Such individuals have submitted statements or complaints through your website, believing they were being submitted directly to United Airlines. As a result of the confusion caused by your website, the communications from these customers to United Airlines has been delayed, or sometimes even lost. In addition, the amount of time between when these customers thought they were communicating with United Airlines and the time when they actually began communicating with United Airlines has been delayed to their detriment.

The second and particularly troubling issue concerns your posting – on a page on the untied.com website under the tagline “Contact UAL” – of names, office and e-mail addresses, and phone numbers of various specific United Airlines employees who have no connection to any issue discussed on your website. As a result of your postings, the individuals listed on your website have received an inordinately large number of e-mails and phone calls, many of an extremely disturbing nature. Not only are these e-mails and calls extremely disruptive, they have caused – and are causing – tremendous emotional strain and stress for these individuals. While we understand that you are a critic of United Airlines, we are sure that facilitating the harassment of individual employees simply trying to do their jobs is not your intent, and that you will have no issues with removing their names and contact information. There is simply no legitimate reason to subject them to the burdens and stress that listing their names on your website has imposed on them.

To give you an idea of the type of issues that the untied.com listings have caused, I have reproduced below portions of a transcript of a voicemail message left by someone who accessed the untied.com website and obtained an employee’s direct phone number from the “Contact UAL” page:

*How come you’re so – uh...uh – familiar with untied.com but you are unwilling to talk to – uh – a member the public about a matter of great interest to United Airlines regarding litigation.*

*What the hell is wrong with [NAME REDACTED]? And how is that different from what is wrong with United Airlines? And how does that differ with what is wrong from the rogue, renegade, lying US government – the former national – I am sorry – the former constitutional republic and current national security state. What’s the matter [NAME REDACTED]? Traitor got your tongue?*

*[NAME REDACTED] would you have made a great Nazi – or just a good one?*

*Do you remember 80 years ago when the German government and media told everyone whom to hate and blame and once everybody knew that everybody knew that everybody knew whom it was not just socially acceptable but expected to amass hate and blame. How it would seem make perfect sense for that nation’s military to go marauding around the world, invading sovereign nations, starting wars all in the name of protecting and defending the fatherland. Of course, you*

September 10, 2012  
Page 3

UNITED



*being female you understand that we're far more progressive this time around. We use the gender-neutral term "homeland" to accomplish the exact same evil thing.*

...

*So maybe that that judge who that said that UAL should – uh – be on the hook for 9/11 isn't – uh – I don't know – part of the same treason party.*

*Untie yourself [NAME REDACTED]. You the one who needs to be untied.*

Considering the content of the message partially reproduced above, you may begin to appreciate the negative impact that your website content has had on the listed United Airlines employees – employees who have no meaningful connections to the criticisms and issues raised on your website. Again, I'm sure this is not your intent, and you therefore will have no concerns with removing all such names and information.

As you will appreciate, the two issues raised above are of significant concern for United Airlines, its customers, and its employees. While there are legal avenues that United Airlines can take to address these concerns, we believe that it would be more productive and beneficial for us both to see if we can reach an agreement to avoid the likelihood of confusion that currently exists with respect to the untied.com website and address the significant concerns raised above with respect to the identified United Airlines employees. In that regard, I invite you to either arrange a call or a face-to-face meeting with me at a mutually convenient location to discuss a resolution of these issues.

Please let me know by September 28, 2012 if you are interested in arranging a call or meeting. If I do not hear from you by that date, I will assume that you do not want to try to work these issues out, and United Airlines will be forced to consider other avenues for resolving these issues.

As a final matter, United Airlines' management has considered the proposal you advanced in an earlier e-mail. You may recall, in that proposal – in response to our initial concerns – you offered your services to United Airlines' management "on a consultancy basis." If you were offering to meet, on a no fee basis, with representatives of United Airlines to discuss thoughts and ideas that you may have to make improvements in its relationships with United Airlines' customers and employees, I would be happy to arrange such a meeting. However, if your proposal was a suggestion that United Airlines retain you as a paid consultant, you surely will understand that we must respectfully decline such an offer. Given the history of your untied.com website, United Airlines does not want to create any appearance or suggestion that it has made payments to stifle the criticisms offered on untied.com, which is simply not United Airlines' practice.

I look forward to talking with you.

September 10, 2012  
Page 4

**UNITED**



Sincerely,

A handwritten signature in black ink that reads "Mike H." followed by a stylized flourish.

Michael C. Henning

September 10, 2012  
Page 5

**UNITED**



**35**

bc: Mark Bergsrud  
Elaine Clark  
Christen David  
Rich Fiore  
Nene Foxhall  
Brett Hart  
Rahsaan Johnson  
Megan McCarthy  
Kevin McKenna  
Dave Messing  
Karin Moan  
Scott Moga  
Jessica Rossman  
Nancy Tibbitts  
Ben Vaughn  
Scott Wilson  
Jeff Wittig  
*United Airlines*

**Schedule "D"**



UNITED



Michael C. Henning  
Managing Counsel - Litigation & Intellectual Property  
(713) 324-5103  
(713) 324-5161 (fax)  
mike.henning@united.com

15th Floor HQSLG  
1600 Smith Street  
Houston, Texas 77002  
united.com

October 2, 2012

VIA E-MAIL

*Without Prejudice*

Jeremy Cooperstock  
McGill University  
McConnell Engineering Building, Rm 424  
3480 rue University  
Montreal H3A 0E9 Quebec  
CANADA  
[jcooperstock@gmail.com](mailto:jcooperstock@gmail.com)

Re: untied.com

Dear Professor Cooperstock:

Thank you for your e-mail of September 25. I appreciate the information you provided and do hope that our dialogue will assist in resolving the concerns that United Airlines has had with untied.com and the confusion that our United Airlines customers have had upon visiting your site. Unfortunately, I was disheartened that you did not address the two concerns that I mentioned in my September 10 correspondence to you. First, as mentioned in my letter, the design of your untied.com site closely mimics the design of United Airlines' united.com website down to color, font, and location of active links. United Airlines' customers have experienced a great deal of confusion due to the very similar look and feel of your untied.com site and United Airlines' united.com site. Additionally, communications submitted by United Airlines' customers via untied.com are sometimes lost or not directed through the appropriate channels, thus impeding the communication flow between United Airlines and its customers. As a result, we remain concerned about your use of United Airlines' trade dress and copyrighted and trademarked materials on your site.

Second, the names of and contact information for several United Airlines employees are still listed on the "Contact UAL" link of untied.com. As mentioned in my September 10 letter, these employees have received extremely disruptive and harassing messages as a result of your posting of their information on untied.com. These individuals have no connection to the issues discussed on your site but nevertheless are being subject to significant stress and burdens as a result of being listed as contacts on your site. I therefore am again requesting that you remove their names from your site. Moreover, although you requested information pertaining to the government's and United's investigation into the very disturbing message that I referenced in my September 10 letter to you, as I'm sure you can appreciate, I cannot disclose specific information

October 2, 2012  
Page 2



at this time in order to preserve the integrity of the investigation and to ensure the safety of our employees.

Finally, I appreciate that you have accepted our offer to meet with us. During the first part of the meeting, we would like to discuss the two issues addressed above in the hopes that we can resolve these very important concerns. In the second part of the meeting, we would be happy to listen to your thoughts and ideas for improving United Airlines' relationships with its customers and employees. Martin Hand, United Airlines' Senior Vice President of Customer Experience, and I will attend the meeting for United Airlines. We are unable to meet with you on October 26, as proposed, but could meet with you in Montreal during the morning of October 31, the afternoon of November 12, or the morning of November 13. Please let me know if any of those dates would work for you.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike H.", with a stylized flourish at the end.

Michael C. Henning



Court File No.: T-2084-12

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

---

**AMENDED STATEMENT OF DEFENCE**

---

Dated: June 20, 2013

**DR. JEREMY COOPERSTOCK**

392 Grosvenor Street

Westmount, Québec H3Z 2M2

Tel: 438-808-6463

*jcooperstock@gmail.com*

Defendant

Court File No.: T-2084-12

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

**AMENDED STATEMENT OF DEFENCE**

1. The Defendant admits the allegations contained in paragraphs 6 and 7 of the Statement of Claim.
2. The Defendant has no knowledge of the allegations contained in paragraphs 1-5 and 9-14 of the Statement of Claim.
3. The allegations contained in ~~paragraphs~~ paragraph 17 of the Statement of Claim are irrelevant. In any event, the removal of the link to [www.inweddingdress.com](http://www.inweddingdress.com) was unrelated to the present action.
4. Pursuant to Rule 184(1) of the *Federal Court Rules*, all allegations of fact in the Statement of Claim that are not admitted are deemed to be denied.

**THE DEFENDANT: DR. JEREMY COOPERSTOCK**

5. The Defendant, Dr. Jeremy Cooperstock, is an individual living in the Province of Quebec, in the City of Westmount.
6. The Defendant is a full-time, tenured, associate professor of electrical and computer engineering at McGill University.
7. The Defendant does not own any business, and does not sell or offer to sell or distribute any goods.
8. Other than his full-time employment with McGill University, the only services that the Defendant offers are as a technical consultant.

**PREDECESSOR OF THE UNTIED.COM WEBSITE: "POORSHOW"**

9. In the summer of 1996, the Defendant travelled on a business and vacation trip with the Plaintiff ~~United Air Lines~~ ("United"), was mistreated by its agents during his travels, and was dissatisfied with United's refusal to address his complaint about his travel experience. The Defendant decided to share his negative experience with the public using his personal web page at the University of Toronto:  
<http://www.dgp.toronto.edu/~jer/poorshow>
10. Over the course of the following months, the Defendant received numerous letters from other travellers about their poor experiences with United. In order to foster an open debate, the Defendant posted on his personal web page the comments he received from these travellers.
11. On September 6, 1996, the Defendant contacted the Plaintiff ~~United~~, brought to its attention the postings on his personal web page, and requested a personalized apology.

12. On or around March 17, 1997, the Plaintiff United contacted the President of the University of Toronto, suggesting that the University might be held liable for the contents of the Defendant's personal web page, and demanded that the University take steps to remove the content posted by the Defendant.
13. On or around March 24, 1997, the Defendant removed the content concerning the Plaintiff United from his personal web page at the University of Toronto, in order to spare the University legal hassles.

#### **THE WEBSITE UNTIED.COM**

14. On April 24, 1997, the Defendant registered the domain Untied.com, and re-launched the content concerning the Plaintiff United as an independent website ("Defendant's Website").
15. For over 15 years, since 1997, the Defendant has been maintaining the website Untied.com as both a forum for postings by passengers and employees of the Plaintiff United and as a satirical website, employing parody to expose poor service to passengers and mistreatment of employees by the Plaintiff United.
16. Visitors to Untied.com are offered the opportunity to post their account of their experiences with the Plaintiff United. Each posting is automatically assigned a unique ID number.
17. The Defendant denies the allegation at paragraph 16 of the Statement of Claim that he instructed any visitor to Untied.com to use the ID number automatically generated by Untied.com in correspondence with the Plaintiff United.

18. On the contrary, visitors who wish to submit a posting to Untied.com are presented with the following disclaimer:

Note that you are submitting your complaint to Untied.com, a website that provides a service for past and prospective passengers, alerting them to United Airlines' attitude towards its customers and employees. You may also wish to submit your complaint directly to any of the contacts at United Airlines. Before you do so, please see some tips for passengers considering legal action against the airline. And if you think United Airlines will take your complaint seriously, think again.

Furthermore, those who submit a posting to Untied.com are automatically sent an email message advising them of the appropriate avenues for contacting the Plaintiff United.

**~~THE PLAINTIFFS ARE~~ PLAINTIFF IS THE MAKERS OF THEIR ITS OWN MISFORTUNE**

19. On February 21, 1994, the Plaintiff United registered the domain name ual.com, and launched its website under that address.
20. Thus, in 1997, at the time of the registration of Untied.com, there was no possibility of confusion between Untied.com and the Plaintiff United's Plaintiff's website, which was operating under the address ual.com.
21. The Plaintiff United has been aware of the Defendant's Untied.com website since 1997.
22. On December 17, 1998, 20 months after the Defendant launched his Untied.com website, the Plaintiff United registered the domain united.com.
23. On November 7, 2000, that is, more than three years after the Defendant launched his Untied.com website, the Plaintiff United registered the



Canadian domain united.ca.

24. Therefore, the ~~Plaintiffs are~~ Plaintiff is the makers of their its own misfortune, because they it chose to use the domain names united.com and united.ca even though they it knew about the pre-existence of the Untied.com website.

**COMPARISON: LOGOS DISPLAYED BY DEFENDANT VS. BY PLAINTIFFS PLAINTIFF**

25. The predecessor of the Untied.com website, entitled "poorshow," which was posted on the Defendant's personal web page at the University of Toronto, displayed the following logo:



Defendant replaced this logo after United Air Lines expressed concern about the possibility that the logo may be misunderstood as a crashing airplane.

26. In part of 1998 and 1999, Untied.com displayed the following logo:

# UNTIED AIRLINES

The most Unfriendly Skies



27. In 1999, the logo displayed on Untied.com was changed to the following:



This logo was displayed on Untied.com until March 2007.

28. Until 2005, the Plaintiff United displayed the following logo on its website:



29. In March 2007, the logo displayed on Untied.com was changed to the following:



30. Between 2006 and 2010, the Plaintiff United displayed the following logo on its website:



31. Since 2011, the Plaintiffs have Plaintiff has been displaying the following logo on their its website:



32. In August 2011, the Defendant redesigned the Untied.com website, and changed the logo displayed there to one that includes a frowning globe:



**DEFENDANT'S RESPONSE TO THE ~~PLAINTIFFS'~~ PLAINTIFF'S CONCERNS**

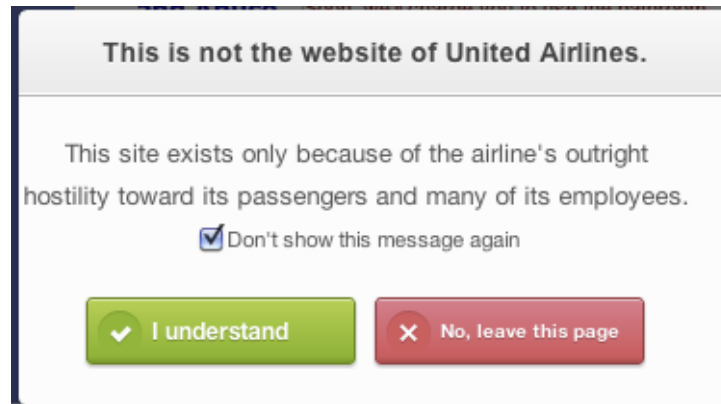
33. Between 1999 and July 16, 2012, the Plaintiffs Plaintiff expressed no concern nor objection regarding the logos displayed on the Defendant's website, which parodied the logos displayed by the Plaintiffs Plaintiff.

34. In early October 2012, the Defendant made the following changes on Untied.com in response to the ~~Plaintiffs'~~ Plaintiff's concerns as an additional, possibly unnecessary, safety measure to avoid any possible confusion:

- (a) The logo displayed on Untied.com was changed to the following (the color of the letters "TI" and the frown were changed to red):



- (b) A disclaimer that reads "(This is **not** the web page of United Airlines)" was added.
- (c) A pop-up, requiring first-time visitors to acknowledge that they understand that Untied.com is not the website of the Plaintiffs Plaintiff, was added:



35. The Defendant denies that a reasonable person could confuse his web-site, Untied.com, with the Plaintiffs' Plaintiff's website.

#### **COPYRIGHT**

36. The Defendant denies the Plaintiffs' Plaintiff's allegations that copyright subsists in the items listed in paragraphs 8-10 of the Statement of Claim.
37. Alternatively, the Defendant denies that the Plaintiffs' Plaintiff's own copyright in any of the items listed in paragraphs 8-10 of the Statement of Claim.
38. In the further alternative, the Defendant denies that the Defendant's Website reproduces a substantial part of any work in which the Plaintiffs own Plaintiff owns copyright.
39. With respect to paragraph 15 of the Statement of Claim, the graphics and text used on the Defendant's Website reproduce no substantial part of any original expression or work in which the ~~Plaintiffs own~~ Plaintiff owns copyright.
40. With respect to paragraph 9 of the Statement of Claim, the Plaintiffs Plaintiff can claim no copyright in banal and non-original design ele-

ments such as the use of “Sans-serif” font. The alleged use by the Defendant of particular design elements of the Plaintiffs’ Plaintiff’s website constitutes insubstantial copying that does not attract liability under section 3 of the *Copyright Act*, because the Defendant’s Website has markedly different content and functionality.

41. In the further alternative, any dealing on the Defendant’s Website with a substantial part of any work the copyright to which is owned by the Plaintiffs Plaintiff constitutes fair dealing for the purposes of parody, satire, criticism, and/or review, and as such constitutes no infringement pursuant to sections 29 and 29.1 of the *Copyright Act*.

#### **DEFENDANT IS NOT ENGAGED IN COMMERCIAL ACTIVITY**

42. The present matter relates to consumer criticism and consumer expression. It is far removed from the sort of commercial dispute for which a claim in trade-mark is appropriate.
43. According to paragraph 4 of the Statement of Claim, the Plaintiffs operate Plaintiff operates a large global airline, and ~~sell~~ sells air travel tickets on their its website.
44. In sharp contrast, the Defendant is an educator, who is engaged in no commercial activity or course of trade.
45. The Defendant is not a business, and in particular, not a business in the same area as the Plaintiffs Plaintiff.
46. The Defendant’s Website does not sell wares or services. The Defendant’s Website transfers no property in or possession of any wares. The Defendant’s non-commercial speech embodied in the Defendant’s

Website does not constitute a “service” within the meaning of the *Trade-marks Act*.

**TRADE-MARK**

47. The Defendant’s Website offers no “use” of trade-marks in association with the transfer of wares or advertisement or performance of services, as that term is defined and used in the *Trade-marks Act*. No trade-marks are associated with the transfer of property in or possession of any wares, nor associated with the advertisement or performance of any service.

48. The Defendant's Website makes no use of marks as a "trade-mark", that is, for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by the Defendant – or anyone, for that matter – from those manufactured, sold, leased, hired or performed by others.
49. The Defendant uses no marks on the Defendant's Website that are owned by the Plaintiffs Plaintiff.
50. In the alternative, the Defendant's use of any marks on the Defendant's Website – which use is denied – does not constitute use of a mark in association with any ware or service itemized in any trade-mark registration registered in the Plaintiffs' Plaintiff's name.
51. In the further alternative, the Defendant's Website does not sell, distribute or advertise wares or services in association with a mark confusing with any trade-mark owned by the Plaintiffs Plaintiff. There is no likelihood of confusion between any trade-mark owned by the Plaintiff and anything on the Defendant's Website.
52. The theoretical possibility of such confusion – which is denied – is extinguished by the liberal use of disclaimers on the Defendant's Website, which specifically alert visitors to the Defendant's Website to the fact that it is not operated by the Plaintiffs Plaintiff.
53. The Defendant has made no use of a trade-mark registered by the Plaintiffs Plaintiff in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto. To the extent that the Plaintiffs' Plaintiff's goodwill has depreciated, the Defendant claims that such goodwill attaches to the Plaintiffs' Plaintiff's business reputation, and not to the attractive force of its registered trade-marks.

54. According to the United States Department of Transportation, the ~~Plaintiffs~~ Plaintiff is the most complained about airline. Thus, it is unreasonable and ludicrous to allege that damage to goodwill has its source in the Defendant's actions.
55. Section 22 of the *Trade-marks Act* does not shield the ~~Plaintiffs~~ Plaintiff from the harmful ramifications of their its own treatment of passengers and/or their its own employees.

#### **DELAY OF 15 YEARS**

56. The ~~Plaintiffs have~~ Plaintiff has been aware of the Defendant's Website, the domain Untied.com, and the Defendant's expressive activities therein for more than 15 years.
57. The ~~Plaintiffs have~~ Plaintiff has not brought legal claims against the Defendant during that time, and the Defendant has relied upon the ~~Plaintiffs'~~ Plaintiff's conduct. The ~~Plaintiffs are~~ Plaintiff is now barred from raising claims that ought to have been brought years ago.
58. The ~~Plaintiffs~~ Plaintiff now attempt attempts to revive their its claim in trade-mark by framing it in copyright. The ~~Plaintiffs~~ Plaintiff should not thereby be allowed to sidestep a delay of a decade and a half.

#### **ABUSE OF PROCESS**

59. This action is an abuse of process and should be dismissed, or in the alternative, the ~~Plaintiffs~~ Plaintiff should be denied equitable relief.
60. The ~~Plaintiffs have~~ Plaintiff has brought this action in bad faith, without justification, and with an extraneous and improper purpose, namely, to use this litigation to coerce the Defendant to shut down the Untied.com



website.

61. The ~~Plaintiffs have~~ Plaintiff has not previously asserted their its rights with respect to copyright in Canada. Indeed, as Schedule “A” of the Statement of Claim demonstrates, ~~Plaintiffs~~ Plaintiff registered their its copyright only on October 29, 2012, that is, 21 days before instituting the present action.
62. The ~~Plaintiffs have~~ Plaintiff has no reasonable ground to believe that the Defendant’s Website wrongfully interferes with the ~~Plaintiffs’~~ Plaintiff’s business in Canada or elsewhere.
63. The ~~Plaintiffs’~~ Plaintiff’s predominant purpose in bringing this action is not to preserve or defend any alleged rights under the *Trade-marks Act* or the *Copyright Act*, or to obtain proper compensation for the violation of any such rights. Rather, their predominant purpose is to strong-arm the Defendant into giving up his expressive activities critical of the ~~Plaintiffs’~~ Plaintiff’s conduct.
64. The ~~Plaintiffs’~~ Plaintiff’s unlawful conduct described above is reprehensible, and deserves this Honourable Court’s condemnation.

#### **GOOD FAITH AND REMEDIES**

65. In the alternative, should the Honourable Court find any infringements of copyright or trade-mark, the Defendant has at all times acted in good faith and has taken steps to avoid infringement of ~~Plaintiffs’~~ Plaintiff’s intellectual property.
66. The Defendant was responsive to the ~~Plaintiffs’~~ Plaintiff’s concerns, and offered to meet with the ~~Plaintiffs’~~ Plaintiff’s representatives on a num-

ber of occasions since July 17, 2012. The Defendant was expecting that such a meeting would take place in December 2012; however, instead, ~~Plaintiffs~~ Plaintiff chose to institute the present action against the Defendant.

67. The Defendant denies that ~~Plaintiffs~~ Plaintiff suffered any damages as a result of the Defendant's actions. To the extent that the ~~Plaintiffs are~~ Plaintiff is ultimately found to be entitled to damages, and elect statutory damages under copyright law, such damages ought to be set at no more than \$100 as non-commercial statutory damages.
68. The Defendant submits that the ~~Plaintiffs'~~ Plaintiff's action against him be dismissed with costs.

June 20, 2013

---

**DR. JEREMY COOPERSTOCK**  
392 Grosvenor Street  
Westmount, Québec H3Z 2M2  
Tel: 438-808-6463

*jcooperstock@gmail.com*

Defendant

TO: **GOWLING LAFLEUR HENDERSON LLP**  
1 Place Ville Marie, 37th Floor  
Montreal, Quebec H3B 3P4

**Me Hélène D'Iorio**

Tel: 514-392-9564  
Fax: 514-878-1450

**Me Lee A. Johnson**

Tel: 514-392-9502

Fax: 514-876-9502

**Solicitor for the Plaintiff,  
United Airlines, Inc.**

## FEDERAL COURT

BETWEEN: UNITED AIR LINES AIRLINES, INC. and  
~~CONTINENTAL AIRLINES, INC.~~

**Plaintiffs**  
Plaintiff

AND

JEREMY COOPERSTOCK

**Defendant**

---

AMENDED REPLY

---

1. The ~~Plaintiffs deny~~ Plaintiff denies all of the allegations contained in the Defendant's Amended Statement of Defence, except as specifically admitted herein, and puts the Defendant to the strict proof thereof.
2. The ~~Plaintiffs~~ Plaintiff accepts the admission made in paragraph 1 of the Amended Statement of Defence.
3. With respect to the Defendant's allegations contained in paragraphs 19 to 24, 28, 30 and 31, the ~~Plaintiffs have~~ Plaintiff has used the trade-marks UNITED and UNITED

AIRLINES in Canada since at least as early as 1939 and these marks are the subject of registration numbers TMA204,456 and TMA367,179.

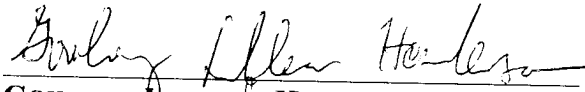
4. With respect to the Defendant's allegations relating to parody, including those contained in paragraphs 33 to 35 and 41, the ~~Plaintiffs deny~~ Plaintiff denies that the logos displayed on the Defendant's website constitute parodies of the ~~Plaintiffs'~~ Plaintiff's works as protected by copyright. The ~~Plaintiffs~~ Plaintiff further submits that any defence of fair dealing for the purposes of parody under Section 29 of the *Copyright Act* was only available as of November 7, 2012 and in any event, is not applicable to the case at hand. Furthermore, the ~~Plaintiffs deny~~ denies that the actions of the Defendant, before or after November 7, 2012, constitute fair dealing under the *Copyright Act*.
5. With respect to paragraph 34, the ~~Plaintiffs~~ Plaintiff alleges that the changes outlined in this paragraph were only made after the filing and service of the Statement of Claim, namely after November 19, 2012.
6. The ~~Plaintiffs~~ Plaintiff admits the allegation contained in paragraph 43.
7. With respect to paragraphs 42 and 44 to 55, the ~~Plaintiffs~~ Plaintiff ~~deny~~ denies that these are defences to trade-mark infringement. With respect to paragraph 52, the ~~Plaintiffs~~ Plaintiff further submits that even if disclaimers were made by the Defendant, which is not admitted by the ~~Plaintiffs~~ Plaintiff, there have been actual instances of confusion where visitors to the UNTIED.com website thought they were on the UNITED website.
8. With respect to paragraphs 56 to 58, the ~~Plaintiffs~~ Plaintiff ~~deny~~ denies that there has been a delay of fifteen (15) years in commencing the present proceeding. The proceeding commenced by the ~~Plaintiffs~~ Plaintiff relates to activities of the Defendant relating to the redesign of his website, which occurred by the Defendant's own admission in 2011, as contained in paragraph 32 of the Amended Statement of Defence.
9. With respect to paragraphs 59 to 64, the ~~Plaintiffs~~ Plaintiff expressly ~~deny~~ denies that the present action is an abuse of process and that the ~~Plaintiffs~~ Plaintiff should be denied equitable relief. As specifically stated in the Amended Statement of Claim, the ~~Plaintiffs~~ Plaintiff ~~are~~ is not seeking to prevent the Defendant from operating a website where

individuals can express their views about the ~~Plaintiffs~~ Plaintiff, but ~~are~~ is rather seeking to protect ~~their~~ its intellectual property rights and prevent consumer confusion over whether the ~~Plaintiffs~~ Plaintiff owns and/or sponsors the Defendant's UNTIED.com website.

10. With respect to paragraph 66, the Defendant refused to modify ~~its~~ his website prior to commencement of the present action.
11. The ~~Plaintiffs~~ Plaintiff further ~~deny~~ denies that the Defendant is entitled to any of the remedies or relief sought in the Amended Statement of Defence, including the remedies and relief sought in paragraphs 59, 67 and 68.

MONTREAL, February 6, 2013.

Amended June 27, 2013.



**GOWLING LAFLEUR HENDERSON LLP**

1 Place Ville Marie  
37<sup>th</sup> floor  
Montreal, Quebec  
H3B 3P4

**Hélène D'Iorio**

Tel: 514-392-9564

Fax: 514-876-9564

**Lee A. Johnson**

Tel: 514-392-9502

Fax: 514-876-9502

Solicitors for the ~~Plaintiffs~~ Plaintiff

TO: The Administrator  
Federal Court of Canada  
Trial Division

AND TO: Jeremy Coopertsock  
392 Grosvenor Street  
Westmount, Quebec  
H3Z 2M2  
Defendant

Federal Court



Cour fédérale

Date: 20130206

Docket: T-2084-12

Ottawa, Ontario, February 6, 2013

PRESENT: The Chief Justice

BETWEEN:

UNITED AIR LINES, INC. AND  
CONTINENTAL AIRLINES, INC.

Plaintiffs

and

JEREMY COOPERSTOCK

Defendant

**ORDER**

**IT IS ORDERED** pursuant to Rule 383 that Prothonotary Richard Morneau is assigned as Case Management Judge in this matter.

“Paul S. Crampton”  
\_\_\_\_\_  
Chief Justice



Date: 20131126

Docket: T-2084-12

Montréal, Quebec, November 26, 2013

**PRESENT:** Richard Morneau, Esq., Prothonotary

**BETWEEN:**

**UNITED AIRLINES, INC.**

**Plaintiff**

**and**

**JEREMY COOPERSTOCK**

**Defendant**

**ORDER**

**UPON** considering the correspondence filed by the parties in connection with the deadline of November 22, 2013 found in paragraph II f) of the order of this Court dated June 10, 2013, the Court is satisfied that it is fair and reasonable and hereby extends said deadline to February 28, 2014.

**“Richard Morneau”**

Prothonotary



Court File No.: T-2084-12

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

**AFFIDAVIT OF DR. JEREMY R. COOPERSTOCK**

I, **DR. JEREMY R. COOPERSTOCK**, of the City of Westmount, in the Province of Quebec, AFFIRM THAT:

1. I am the Defendant in this proceeding, and as such I have personal knowledge of the matters deposed to.
2. I have been maintaining the website Untied.com for more than 16 years as both a forum for postings by passengers and employees of United Airlines and as a satirical website, employing parody to criticize the conduct of the airline's service to passengers and treatment of employees.

3. In this time, my website:

- (a) has compiled a publicly viewable database of over 25,000 complaints;
- (b) offers various information resources to the public;
- (c) describes the plaintiffs' customer relations record;
- (d) provides information concerning the legal rights of passengers and employees;
- (e) summarizes decisions of the CTA; and
- (f) analyzes safety concerns.

4. All of this material is critical of the plaintiff's conduct, embarrassing to the airline, and has encouraged numerous passenger and employee lawsuits against the plaintiff.

5. On November 19, 2012, I was served with the statement of claim in the present proceeding, alleging copyright infringement, trade-mark infringement, and passing off. The remedies sought by the plaintiff include damages, profits and statutory damages, in addition to an injunction against me.

6. On November 19, 2012, the plaintiffs also commenced a second proceeding against me in the Quebec Superior Court. A motion to dismiss the second proceeding as a SLAPP action is currently before the Quebec Superior Court.

7. United Airlines, as the sole plaintiff, filed its amended statement of

claim on June 12, 2013. I filed my amended statement of defence on June 20, 2013, and the plaintiff filed its amended reply on June 27, 2013.

8. On August 22, 2013, I was examined for discovery by the plaintiff's counsel, with Me Louis Beliveau acting as my counsel for the purpose of examinations.

9. On October 2, 2013, Me Louis Beliveau conducted examination on discovery of the plaintiff's representative, Mr. Scott Wilson.

10. On November 25, 2013, the plaintiff advised me as part of its response to undertakings and advisements that United Airlines was no longer pursuing its claim for monetary compensation. The relevant page of the plaintiff's response to undertakings (refusal no. 85–86) is attached and marked as Exhibit "A".

11. Since the abandoned/withdrawn claim in paragraphs (h) and the associated claim in paragraph 31 are prejudicial to me and are no longer relevant, I wrote to counsel for the plaintiff on November 27, 2013, requesting that:

- (a) United remove paragraphs (h) and 31 from its amended statement of claim, as these may cause unnecessary confusion, and may be prejudicial for me at trial.
- (b) United reimburse my thrown away costs incurred in relation to the claim for damages, which has been withdrawn and/or abandoned.

12. On December 2, 2013, Me D'lorio, counsel for the plaintiff, responded that in her opinion "there is no need to amend the statement of claim".

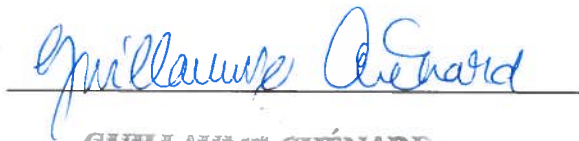
13. On December 6, 2013, I elaborated on my earlier request to counsel for the plaintiff, and again requested that United remove paragraphs (h) and 31 from its amended statement of claim, and reimburse my thrown away costs incurred in relation to the plaintiff's withdrawal and/or abandonment of its claim for damages. On December 10, 2013, the plaintiff again refused my request.

14. On December 13, 2013, I sought directions and intervention of the court in this matter, and provided copies of correspondence with opposing counsel. A copy of my letter seeking directions is attached and marked as Exhibit "B".

15. On December 17, 2013, the plaintiff sent its response to the court, a copy of which is attached and marked as Exhibit "C".

16. On December 18, 2013, I provided further clarification to the court, a copy of which is attached and marked as Exhibit "D".

**AFFIRMED** before me at the City of  
Montréal, in the Province of Québec  
on January 17, 2014.

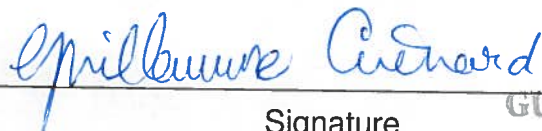


**GUILLAUME CHÉNARD**  
AGENT DU GREFFE  
REGISTRY OFFICER



Dr. Jeremy R. Cooperstock  
392 Grosvenor Avenue  
Westmount, Québec H3Z 2M2  
Tel: 438-808-6463  
jcooperstock@gmail.com

This is **Exhibit "A"** to the Affidavit of Dr. Jeremy R. Cooperstock  
affirmed before me on January 17, 2014

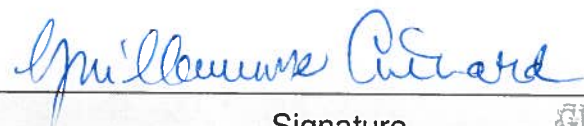


Signature

GUILLAUME CHÉNARD  
AGENT DU GREFFE  
REGISTRY OFFICER

Refusal no.	Transcript page no.	Question	Response
		United? [exhibit 29]	
78	237	What changes did United make as a result of what it learned from this incident? [exhibit 29]	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded.
79	241	Are the events described in the second video true? [exhibit 29]	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded.
80	242	Have you calculated the amount of revenue that United allegedly lost as a result of the second video? [exhibit 29]	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded.
81-82	242	Did United Sue Jim Stanek/Why not?	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded, but United confirms that it did not sue Mr. Stanek.
83	243	Wasn't Jim Stanek disparaging United?	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded and calls for a legal interpretation.
84	243	What changes did United make as a result of what it learned from this (Jim Stanek) incident?	<b><u>Refused</u></b> . Not relevant to any of the issues pleaded.
85	246	Provide specific answers, so specific type of damages, specific dollar amounts, specific prejudice that United suffered or claims to suffer as a result of the infringement which it alleges that Untied.com/ Jeremy Cooperstock is responsible for?	<b><u>Refused</u></b>  United hereby confirms that it will not be claiming monetary compensation in the present proceeding for the infringement of its rights and as such, the questions are not relevant.
86	247	Is there any reason why an amount of damages was not listed in the Statement	

This is **Exhibit "B"** to the Affidavit of Dr. Jeremy R. Cooperstock  
affirmed before me on January 17, 2014



Signature

GUILLAUME CHÉNARD  
AGENT DU GREFFE  
REGISTRY OFFICER

Dr. Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, QC H3Z 2M2

*jcooperstock@gmail.com*

December 13, 2013

**VIA FACSIMILE**

The Administrator  
Federal Court  
30 McGill Street  
Montreal, QC  
H2Y 3Z7

**Re: United Airlines, Inc. v. Jeremy Cooperstock**  
**Court File No.: T-2084-12**  
**Request for directions**

Dear Madam or Sir:

I am writing to ask for the directions and intervention of this Honourable Court with respect to three matters that I have been unable to resolve directly with counsel to the Plaintiff:

- (i) amendments related to United abandoning/withdrawing its claim for monetary compensation;
- (ii) throw-away costs incurred due to the abandoned/withdrawn claim for compensation; and
- (iii) providing the Word or Excel file of United's undertakings and refusals chart.

Prothonotary Morneau is the Case Management Judge and it is requested that this letter be brought to his attention.

**I. Amendment of the Amended Statement of Claim**

In the Amended Statement of Claim, dated June 12, 2013, United pleaded that it "has suffered and continues to suffer considerable damages" (para. 31) and sought monetary damages (para. (h)). As a result, the issue of damages allegedly suffered by United was prominently featured in examination for discovery by both parties.

On November 25, 2013, United advised me as part of United's response to undertakings and admissions that United was no longer pursuing its claim for monetary compensation.



On November 27, 2013, I wrote to counsel for the Plaintiff (Annex “A”), requesting that United remove paragraphs (h) and 31 from its Amended Statement of Claim, as these may cause unnecessary confusion, and may be prejudicial for me at trial.

On December 2, 2013, Me D’Iorio responded that in her opinion “there is no need to amend the Statement of Claim” (Annex “B”). My subsequent attempt to ask United to remove paragraphs (h) and 31 has also been unsuccessful (Annexes “C” and “D”).

In light of United having abandoned/withdrawn its claim for monetary compensation, and in the absence of a clear explanation by United, I am struggling to see any legitimate purpose served by paragraphs (h) and 31 of United’s Amended Statement of Claim. In light of the history of the present action, United’s inexplicable refusal to remove these paragraphs leaves one wondering as to United’s true intentions.

I am concerned that although United has clearly indicated that it abandoned/withdrew its claim for monetary damages, paragraphs (h) and 31 of United’s Amended Statement of Claim may cause unnecessary confusion, and may be prejudicial for me at trial.

I am asking for the Honourable Court’s protection from what transpires as an attempt by United to abuse the Court’s process and maintain a claim for monetary damages in its Amended Statement of Claim that United has abandoned/withdrawn.

## **II. Costs thrown away**

The issue of United’s alleged damages occupied a substantial portion of the examinations for discovery and the transcripts of the examinations. Consequently, I incurred costs thrown away in relation to the abandoned/withdrawn claim for monetary damages: legal fees of counsel who was assisting me during the examinations, and the fees payable to the court reporter.

In my November 27, 2013 letter, I advised United that I incurred costs thrown away, and in my December 6, 2013 letter (Annex “C”), I provided a detailed break-down. For greater clarity, these costs are only the portion of the discovery costs that were incurred specifically with respect to the issue of damages. Unfortunately, my request that United reimburse my costs thrown away was met with refusal (Annexes “B” and “D”).

While I have no doubt that United can afford expending substantial resources on pursuing meritless claims that it abandons and withdraws prior to trial, my resources are significantly more limited.

I am asking the Honourable Court to order United to pay costs thrown away as a result of its abandoned/withdrawn claim in the amount of \$757.27, inclusive of taxes and disbursements.

### **III. Original file of United's chart of refusals**

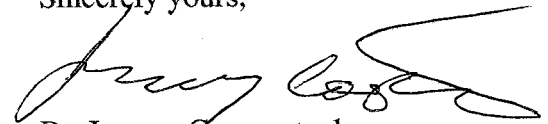
On November 25, 2013, United provided me with a 24-page document containing United's answers to undertakings, advisements, and refusals.

I have asked Me D'Iorio on two occasions to provide me with this 24-page document in its original (Word or Excel) file format so that I may accurately incorporate United's answers into my refusals motion. I was not requesting any kind of secretarial assistance (as Me D'Iorio's answers suggest).

Unfortunately, Me D'Iorio has refused my requests.

I am asking that the Honourable Court direct United to provide me with the document in question in its original (Word or Excel) format.

Sincerely yours,



Dr. Jeremy Cooperstock

Cc: Me Hélène D'Iorio, Gowling Lafleur Henderson LLP  
Me Lee Johnson, Gowling Lafleur Henderson LLP

Dr. Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, QC H3Z 2M2

*jcooperstock@gmail.com*

November 27, 2013

**VIA EMAIL**

Me Hélène D'Iorio  
Gowling Lafleur Henderson LLP  
1 Place Ville Marie, 37th Floor  
Montréal, QC HJ8 JP4

Dear Me D'Iorio :

**Re: United Airlines, Inc. v. Jeremy Cooperstock  
Federal Court File No.: T-2084-12  
Undertakings, Advisements, and Refusals  
Withdrawal and/or abandonment of claim for damages / Throw-away costs**

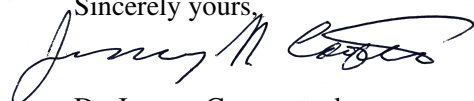
On November 25, 2013, United clearly indicated that it is no longer pursuing a claim of monetary compensation (see refusals (objections) 85 and 86). I am therefore requesting that:

- (a) United amend its Amended Statement of Claim accordingly, so as to avoid the possibility of confusion on this matter at trial, or alternatively, state its reasons for refusing to do so in spite of the withdrawal and/or abandonment of this claim;
- (b) United reimburse my thrown away costs incurred in relation to the claim for damages, which has been withdrawn and/or abandoned.

Kindly please address these points as soon as possible, because it profoundly affects the contents of my refusals motion.

Finally, kindly please send me a copy of your Responses Provided November 25, 2013 as a table in Microsoft Word format to facilitate my task of preparing the refusals motion in accordance with the Order of Prothonotary Morneau, dated June 10, 2013.

Sincerely yours,



Dr. Jeremy Cooperstock



montréal • ottawa • toronto • hamilton • waterloo region • calgary • vancouver • beijing • moscow • london

December 2, 2013

**BY EMAIL ONLY**

Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, Quebec H3Z 2M2

**Hélène D'Iorio**  
Direct 514-392-9564  
Direct Fax 514-876-9564  
helene.diorio@gowlings.com

Dear Mr. Cooperstock:

**Re: United Airlines, Inc. v. Jeremy Cooperstock**  
Federal Court no. T-2084-12  
Our file: L104500011

---

This is in response to your letter dated November 27, 2013.

After considering the responses you gave on your examination for discovery, the Plaintiff made the determination to not pursue monetary compensation and limit the issues for trial. Under the circumstances, there is no need to amend the Statement of Claim. There is also no issue of "thrown away costs" for which United would need to reimburse you.

As to the matter of your refusal motion, the Order of Prothonotary Morneau of June 10, 2013 provides that the party who brings the motion must prepare a motion record which contains a chart where the number of the question is identified, the question per se and the position of the party seeking an answer to the question. Once this chart is prepared, you are to forward it to us to complete and provide our position as to the question. As such, the onus is on you as the moving party to prepare the said chart.

Yours very truly,

**GOWLING LAFLEUR HENDERSON LLP**

Hélène D'Iorio

HDI:cb

Dr. Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, QC H3Z 2M2

*jcooperstock@gmail.com*

December 6, 2013

**VIA EMAIL**

Me Hélène D'Iorio  
Gowling Lafleur Henderson LLP  
1 Place Ville Marie, 37th Floor  
Montréal, QC HJ8 JP4

Dear Me D'Iorio:

**Re: United Airlines, Inc. v. Jeremy Cooperstock  
Federal Court File No.: T-2084-12  
Undertakings, Adviseements, and Refusals  
Withdrawal and/or abandonment of claim for damages / Throw-away costs**

I am in receipt of your letter of December 2, 2013. For greater clarity, I elaborate below on my previous requests.

**I. Amending the Statement of Claim**

As a result of the Plaintiff's determination to not pursue monetary compensation, the Amended Statement of Claim now contains immaterial or redundant claims regarding damages. Thus, I am requesting that United strike out paragraphs (h) and 31 from its Amended Statement of Claim, which are immaterial and/or redundant and/or prejudicial.

**II. Thrown away costs**

The question of monetary damages, which the Plaintiff is no longer pursuing, nevertheless played a significant role, both in the Plaintiff's examination on discovery of the Defendant on August 22, 2013, and the Defendant's examination on discovery of Mr. Wilson, on behalf of the Plaintiff, on October 2, 2013.

December 6, 2013

Page 2 of 2

The associated costs are estimated as follows:

Item	Details	Cost	Taxes	Total
<b>Examination of Defendant:</b>				
Transcript costs	59 pages    \$0.60/page	\$35.40	\$5.30	\$40.70
Legal counsel	2 hours    \$225.00/hr	\$450.00	\$58.50	\$508.50
<b>Examination of Scott ilson:</b>				
Transcript costs	22 pages    \$3.20/page	\$70.40	\$10.54	\$80.94
Legal counsel	0.5 hours    \$225.00/hr	\$112.50	\$14.63	\$127.13
<b>Total</b>				<b>.2</b>

Since the question of monetary damages is no longer relevant to the proceedings, these represent thrown away costs, for which I request reimbursement from United.

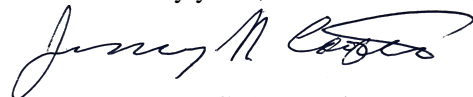
### III. Chart of refusals

You will recall that the January 23, 2013 Order of Prothonotary Morneau specifically noted the expectation of the Court that the parties will see to cooperate better in the conduct of this file.

I will be preparing a chart for my refusal motion, in accordance with the Order of Prothonotary Morneau of June 10, 2013, starting from the list of questions as contained in your Responses Provided November 25, 2013.

I am not asking that you carry out any additional work, but reiterate my request that you send me a copy of this document in its source format, which appears to be a table in Microsoft Word or Excel format. This would save me the effort of having to retype these questions.

Sincerely yours,



Dr. Jeremy Cooperstock



montréal • ottawa • toronto • hamilton • waterloo region • calgary • vancouver • beijing • moscow • london

December 10, 2013

**BY EMAIL ONLY**

**Hélène D'Iorio**  
Direct 514-392-9564  
Direct Fax 514-876-9564  
helene.diorio@gowlings.com

Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, Quebec H3Z 2M2

Dear Mr. Cooperstock:

**Re: United Airlines, Inc. v. Jeremy Cooperstock**  
Federal Court no. T-2084-12  
Our file: L104500011

---

This is in response to your letter dated December 6, 2013. We maintain our position as outlined in our letter of December 2, 2013. On the issue of your motion, we reiterate that as the moving party you have the onus of preparing the motion record and chart. The case management judge most certainly never suggested that we should provide you with secretarial assistance in the preparation of your motion record. Furthermore, the stenographer provided you with a Word version of the transcript which would be a good starting point for preparing your list of questions, should you not wish to retype them yourself. Finally, since you consistently allege that you have limited time and resources, we would respectfully suggest that you use such time and resources in preparing your motion record rather than repeatedly making unreasonable demands from opposing counsel.

Yours very truly,

**GOWLING LAFLEUR HENDERSON LLP**

Hélène D'Iorio

HDI:cb

This is **Exhibit "C"** to the Affidavit of Dr. Jeremy R. Cooperstock  
affirmed before me on January 17, 2014

Guillaume Chénard

Signature

GUILLAUME CHÉNARD  
AGENT DU GREFFE  
REGISTRY OFFICER



December 17, 2013

**VIA FASCIMILE**

The Administrator,  
FEDERAL COURT  
30 McGill Street  
Montreal, Quebec H2Y 3Z7

**Hélène D'Iorio**  
Direct 514-392-9564  
Direct Fax 514-876-9564  
helene.diorio@gowlings.com

Dear Sir:

**Re: United Air Lines, Inc. and Continental Airlines, Inc. v. Jeremy Cooperstock**  
Federal Court no. T-2084-12  
Our Reference: L104500011

---

This is in response to the letter from the Defendant dated December 13, 2013. It is requested that this letter be brought to the attention of Prothonotary Morneau who is the Case Management Judge in this matter.

As the Court is aware, the Plaintiff had asked the Defendant whether he would consent to a bifurcation order in this matter and the Defendant refused. Accordingly, the Plaintiff proceeded with the examination for discovery of the Defendant on all issues pleaded. Having regard to the information provided by the Defendant both during the examination for discovery and subsequently in written responses to undertakings, the Plaintiff made the decision not to seek monetary compensation at trial, thus narrowing the issues for trial and thereby lessening the strain on the Court's time and resources and on that of the parties. It is the Plaintiff's position that no amendment of the Statement of Claim is necessary and that there is no issue of costs thrown away. The pre-trial conference memorandum to be filed by the Plaintiff will address the fact that it is not seeking monetary compensation

On the issue of the chart for the motion to compel, the Defendant refers to a 24-page document provided by the Plaintiff. This constitutes the answers to the undertakings, some of the questions taken under advisement and refusals. Clearly, the motion of the Defendant will be limited to some of the refusals. The answers provided by the Plaintiff, which are to be part of the motion to compel are brief as they are refusals. The Defendant has the onus to prepare the motion record and there is no basis in the *Rules* or in current practice for the Plaintiff to provide a document in Word format, particularly having regard to the fact that metadata is embedded into Word files. As such, providing files in Word format includes providing the underlying metadata which we consider subject to solicitor-client and litigation privilege. Furthermore, the Plaintiff's answers have been provided to the Defendant as a PDF document. The Defendant can extract the text from such a PDF document,

without the metadata associated with the Word file. It is respectfully submitted that the Defendant is once more attempting to delay this proceeding.

Yours very truly,

**GOWLING LAFLEUR HENDERSON LLP**

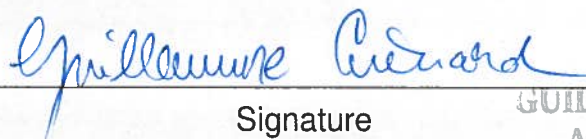


Hélène D'Iorio

HDI:cb

✓ c.c. Jeremy Cooperstock

This is **Exhibit "D"** to the Affidavit of Dr. Jeremy R. Cooperstock  
affirmed before me on January 17, 2014



Signature

GUILLAUME CHÉNARD  
AGENT DU GREFFE  
REGISTRY OFFICER

Dr. Jeremy Cooperstock  
392 Grosvenor Street  
Westmount, QC H3Z 2M2

*jcooperstock@gmail.com*

December 18, 2013

**VIA FACSIMILE**

The Administrator  
Federal Court  
30 McGill Street  
Montreal, QC  
H2Y 3Z7

**Re: United Airlines, Inc. v. Jeremy Cooperstock**  
**Court File No.: T-2084-12**  
**Request for directions**  
**Reply**

Dear Madam or Sir:

This is in reply to the letter from Plaintiff's counsel of December 17, 2013. Prothonotary Morneau is the Case Management Judge and it is requested that this letter be brought to his attention.

**I. Original file of United's chart of refusals**

The reason that I am seeking the chart of refusals in its original (Word) format is precisely because I have been unable to accurately extract the text and the tables from the PDF document I received from Me D'Iorio. I attempted to apply optical character recognition (OCR) software to the PDF document, but tables cannot be properly extracted by OCR.

As explained on the official website of Microsoft Office, all metadata can be removed from a Microsoft Word document by clicking on the appropriate checkboxes in the *Document Inspector* function (see Annex "A"). Consequently, Me D'Iorio's concerns with respect to the metadata contained in the file are ill founded, and can easily be remedied. Furthermore, as an additional assurance to respect United's solicitor-client privilege, I undertake to not attempt to access the information that may be contained in the file's metadata.

## **II. Withdrawn motion for bifurcation**

Me D'Iorio appears to be misremembering the chronology of United's bifurcation motion. As the Court's file shows, United first brought the motion, causing me to incur a significant burden in researching and preparing a response, and then United withdrew the motion. Consequently, United's attempt to rely on its withdrawn motion is disingenuous.

United brought the bifurcation motion, and has now abandoned its claim for monetary damages, for the sole purpose of concealing the abusive and vexatious nature of its claim in relation to a website that is manifestly of a non-commercial nature.

## **III. Costs thrown away**

United brought a claim devoid of any merit for monetary damages, which it has subsequently abandoned. As a result of this abusive conduct, I incurred costs thrown away on examination for discovery involving questions related to this meritless claim.

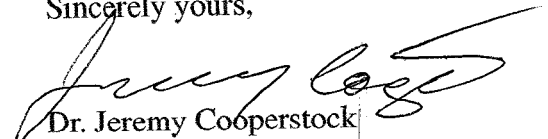
Although these costs may be trivial for a multi-billion dollar corporation with virtually unlimited resources, they are significant for me. Addressing the financial consequences United's conduct by this Honourable Court by way of awarding costs thrown away is of particular import in light of the striking imbalance of resources between the parties, and the public policy consideration of preventing a powerful party from running up the costs of a vulnerable party.

## **IV. Attempt to delay this proceeding**

I have been struggling to follow the logic of Me D'Iorio's concluding allegation, suggesting that I am attempting to delay the proceeding. With due respect, my intent is quite the contrary, namely, to ensure that irrelevant and prejudicial paragraphs, that could cause unnecessary delays and confusion at the trial, are removed from the Amended Statement of Claim.

In the present case, as in the past, it is United's confrontational and uncooperative conduct, and its inexplicable refusal to remove abandoned allegations and claims from the Amended Statement of Claim, that may cause some delay.

Sincerely yours,



Dr. Jeremy Cooperstock

Cc: Me Hélène D'Iorio, Gowling Lafleur Henderson LLP  
Me Lee Johnson, Gowling Lafleur Henderson LLP

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## Remove hidden data and personal information by inspecting documents

If you plan to share an electronic copy of a Microsoft Word document with clients or colleagues, it is a good idea to review the document for hidden data or personal information that might be stored in the document itself or in the document properties (**metadata**). Because this hidden information can reveal details about your organization or about the document itself that you might not want to share publicly, you might want to remove this hidden information before you share the document with other people.

This article describes how the Document Inspector feature in Word can help you find and remove hidden data and personal information in your documents.

Applies to:  
Word 2013, Word 2010

### In this article

- ↓ [Find and remove hidden data and personal information](#)
- ↓ [Types of hidden data and personal information](#)
- ↓ [Information the Document Inspector find and remove](#)

### Find and remove hidden data and personal information

You can use the Document Inspector to find and remove hidden data and personal information in Word documents. It is a good idea to use the Document Inspector before you share an electronic copy of your Word document, such as in an e-mail attachment.

1. Open the Word document that you want to inspect for hidden data and personal information.
2. Click the File tab, click Save As, and then type a name in the File name box to save a copy of your original document.

**IMPORTANT** It is a good idea to use the Document Inspector on a copy of your original document, because it is not always possible to restore the data that the Document Inspector removes.

3. In the copy of your original document, click the File tab, and then click Info.
4. Under Prepare for Sharing, click Check for Issues, and then click Inspect Document.
5. In the Document Inspector dialog box, select the check boxes to choose the types of hidden content that you want to be inspected. For more information about the individual Inspectors, see [Information the Document Inspector finds and removes](#).
6. Click Inspect.
7. Review the results of the inspection in the Document Inspector dialog box.
8. Click Remove All next to the inspection results for the types of hidden content that you want to remove from your document.

**IMPORTANT**

- If you remove hidden content from your document, you might not be able to restore it by clicking Undo.
- If you want to remove hidden data and personal information from documents you save in the OpenDocument Text (.odt) format, you must run the Document Inspector every time that you save the document in this format.

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Court File No.: T-2084-12

**FEDERAL COURT**

BETWEEN:

**UNITED AIRLINES, INC.**

Plaintiff

– and –

**DR. JEREMY COOPERSTOCK**

Defendant

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**WRITTEN REPRESENTATIONS OF THE MOVING PARTY, THE  
DEFENDANT**

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## PART I – STATEMENT OF FACTS

### A. Overview

1. The present motion concerns a very basic question of law: should abandoned/withdrawn claim(s) be struck from a statement of claim?
2. The defendant is appealing the order of Prothonotary Morneau refusing to strike out abandoned/withdrawn claims from the statement of claim and refusing to award the defendant costs thrown away associated with these abandoned/withdrawn claims.

### B. The parties

3. The Plaintiffs are giant corporations with virtually unlimited resources.
4. The Defendant, Dr. Cooperstock, a self-represented litigant in these proceedings, is a professor at McGill University.

### C. Procedural history

5. On November 19, 2012, the defendant was served with the statement of claim in the present proceeding, for which the remedies sought by the plaintiff include damages, profits and statutory damages, in addition to an injunction.

**Amended statement of claim, para. (h)**

**[Tab 3, P10]**

6. On February 6, 2013, Prothonotary Morneau was appointed as Case Management Judge in the present proceeding.

**Order of Chief Justice Paul S. Crampton**

**[Tab 6, P59]**



7. The plaintiff filed its amended statement of claim on June 12, 2013. The defendant filed his amended statement of defence on June 20, 2013, and the plaintiff filed its amended reply on June 27, 2013.

**Cooperstock affidavit, para. 7**

**[Tab 8, P63]**

**D. Abandoned/withdrawn claim for monetary damages**

8. On November 25, 2013, the plaintiff advised that it was no longer pursuing its claim for monetary compensation.

**Plaintiff's response to undertakings**

**[Tab 8A, P67]**

9. Since the abandoned/withdrawn claim in paragraph (h) and the associated claim in paragraph 31 are prejudicial to the defendant and are no longer relevant, the defendant wrote to counsel for the plaintiff on November 27, 2013, requesting that:

- (a) United remove paragraphs (h) and 31 from its amended statement of claim, as these may cause unnecessary confusion, and may be prejudicial for the defendant at trial.
- (b) United reimburse the defendant's thrown away costs incurred in relation to the claim for damages, which has been withdrawn and/or abandoned.

**Defendant's letter to opposing counsel**

**[Tab 8B, P72]**

10. On December 2, 2013, Me D'lorio, counsel for the plaintiff, responded that in her opinion "there is no need to amend the statement of claim".

**Plaintiff's response to the defendant**

**[Tab 8B, P73]**

11. On December 6, 2013, the defendant elaborated on his earlier request to counsel for the plaintiff, and again requested that United remove paragraphs (h) and 31 from its amended statement of claim, and reimburse his thrown away costs.

**Defendant's letter to opposing counsel**

**[Tab 8B, P75]**

12. On December 10, 2013, the plaintiff again refused the defendant's request.

**Plaintiff's response to the defendant**

**[Tab 8B, P76]**

13. On December 13, 2013, the defendant sought directions and intervention of the court in this matter, and provided copies of correspondence with opposing counsel.

**Defendant's letter to the court, seeking directions**

**[Tab 8B, P71]**

14. On December 17, 2013, the plaintiff sent its response to the court.

**Plaintiff's response to the court**

**[Tab 8C, P79]**

15. On December 18, 2013, the defendant provided further clarification to the court.

**Defendant's letter to the court, with clarifications**

**[Tab 8D, P83]**

**PART II – STATEMENT OF THE POINTS IN ISSUE**

16. There are two issues to be determined in the present motion:
- (a) Should abandoned/withdrawn claim(s) be struck from a statement of claim?
  - (b) Should the defendant be entitled to costs thrown away resulting from an abandoned/withdrawn claim?

### PART III – STATEMENT OF SUBMISSIONS

#### A. Standard of review

17. A discretionary order of a Prothonotary may be set aside by a judge when the order:

- (a) is clearly wrong, based upon a wrong principle or upon a misapprehension of the facts, or
- (b) raises questions vital to the final issue of the case.

*Canada v. Aqua-Gem Investments Ltd. (C.A.)*, [Tab 11, P103]  
[1993] 2 F.C. 425

*T. Co. Metals LLC v. Federal Ems (Vessel)*, 2011 [Tab 12, P148]  
FC 1067, [2013] 2 F.C.R. 510

18. In the case at bar, the defendant submits that the Prothonotary's order was clearly wrong and was based upon a misapprehension of the facts. Moreover, the prothonotary's order fails to provide any reasons for the decision.

#### B. The prothonotary's order was clearly wrong

(a) Withdrawn claims ought to be struck

(i) General principles

19. Common sense dictates that pleadings serve as a road map for the court. Their purpose is to define the issues, give notice of the case to be met and remedies sought.

*Macalpine v. Executive Officers and Members of the Ontario Progressive Conservative Party*, 2003 [Tab 13, P178]  
O.J. 3089, para. 17

20. A plaintiff's pleadings should contain particulars of every allegation contained therein, and should specify the nature of any damages claimed.

***Federal Courts Rules, S.O.R./98-106,  
Rule 181 and 182***

[Tab 10, P98– P99]

21. The Court may strike out anything contained in a pleading on the grounds that it is immaterial or may prejudice the fair trial of the action.

***Federal Courts Rules, S.O.R./98-106,  
Rule 221(b) and (d)***

[Tab 10, P100]

22. Rules 181, 182 and 221 work in tandem and ought to be considered together as stating that the pleadings should contain every allegation and all remedies sought, but nothing that is irrelevant.

23. It is well-established case law that the pleadings should be narrowed at any stage of the proceedings and the proper method for withdrawing a claim for damages is by way of an amended statement of claim.

***Soulos v. Korkontzilas (H.C.J.), 1990 CanLII 6751  
(ON SC), final paragraph***

[Tab 14, P186]

***Thode v. University of Ottawa, 2012 ONSC 7284,  
para. 2***

[Tab 15, P189]

***Sears Canada Inc. v. Wilson, 1990 CanLII 2446***

[Tab 16, P196]

(ii) **How these principles apply**

24. In the case at bar, the plaintiff's amended statement of claim contains two claims related to damages:

- (h) damages, profits and statutory damages, or whichever one of more those that the Plaintiffs Plaintiff may elect after due inquiry; and

31. By reason of the Defendant's aforesaid activities, the Plaintiffs have Plaintiff has suffered and ~~continue~~ continues to suffer considerable damages whereas the Defendant has made and continues to make illegal profits.

**Amended statement of claim**

**[Tab 3, P7]**

25. The plaintiff advised that it abandoned the claim for monetary compensation on November 25, 2013. Therefore, the abandoned/withdrawn claims are no longer relevant to any of the remedies sought by the plaintiff, and immaterial to the action.

**Plaintiff's response to undertakings**

**[Tab 8A, P67]**

26. There is no prejudice to the plaintiff in removing abandoned/withdrawn claims. However, retaining these claims in the amended statement of claim is prejudicial to the defendant, as it creates confusion and leaves the defendant uncertain as to the case he must meet at trial.

27. At the present stage of the proceedings, the defendant is preparing a motion to compel answers to the plaintiff's refusals. If the damages alleged by the plaintiff are in any way an issue for trial, they affect the contents of the defendant's refusals motion. Otherwise, these allegations should not be in the statement of claim.

28. The learned Prothonotary therefore made an error in law to allow the plaintiff to retain such claims in the statement of claim when these claims have been abandoned/withdrawn.

**(b) Costs thrown away**

29. Rule 402 enshrines the principle that a party is responsible for the costs associated with abandoned actions.

***Federal Courts Rules, S.O.R./98-106, Rule 402***

**[Tab 10, P101]**

30. By the same principle, parties are responsible at least for a partial indemnity of the costs associated with the portion of their action that has been abandoned.

***Soulos v. Korkontzilas (H.C.J.), 1990 CanLII 6751 (ON SC), final paragraph***

**[Tab 14, P187]**

31. Plaintiffs should not be allowed to bring claims against a defendant and then abandon claims without consequence, as this would be inconsistent with the intent of Rule 402. If plaintiffs could avoid costs for withdrawn claims, this would open the floodgates to a large volume of vexatious claims, causing tremendous financial damage to defendants.

32. Discoveries serve the purpose of obtaining information to facilitate proof, thus avoiding unnecessary proof and additional costs at trial.

***Reading & Bates Construction Co. v. Baker Energy Resources Corp., [1988] F.C.J. 1025***

**[Tab 17, P208]**

33. The fact that claims are withdrawn following discovery but before trial does not mean that there are no costs associated with them. The plaintiff's reasons for abandoning/withdrawing claims are immaterial to the question of costs thrown away.

34. The learned Prothonotary failed to apply the correct legal principles associated with Rule 402 by ignoring costs thrown away based on the stage at which the plaintiff's claims were abandoned/withdrew.

**C. Misapprehension of the facts – no evidence**

35. The transcripts of the examination of discoveries of the parties were not before the learned Prothonotary when he rendered his decision.

36. Therefore, the Prothonotary had no basis for rendering his decision, which resulted from a misapprehension of the facts.

37. If the learned Prothonotary felt that he did not have enough information before him, he should have deferred his decision to the trial judge, who could have factored this amount into the calculation of costs.

***Cape Breton Development Corp. v. D. Roper Services Ltd.*, 2002 NSSC 39, para. 14**

**[Tab 18, P218]**

**D. No reasons for decision**

38. The duty to give reasons is a salutary one that is only fulfilled if the reasons provided are adequate. Adequate reasons are those that serve the functions for which the duty to provide them was imposed. Reasons serve a number of purposes:

- (a) focus the decision maker on the relevant factors and evidence;
- (b) provide the parties with the assurance that their representations have been considered;



- (c) provide a basis for an assessment of possible grounds for appeal;
- (d) allow the appellate court to determine whether the decision maker erred and thereby render him or her accountable.

***VIA Rail Canada Inc. v. National Transportation Agency*, 2000 CanLII 16275 (FCA), [2001] 2 FC 25, paras. 17–19, 21** [Tab 19, P229]

39. The failure of Prothonotary Morneau to give any reasons for his decision renders it impossible to review that order to ascertain whether the Prothonotary acted on a wrong principle or a misapprehension of the facts.

***Bank of the West v. The 26' Well Craft Scarab (Ship)*, 2007 FC 1112, para. 7** [Tab 20, P239]

***Infonet Services Corp. v. Matrox Electronic Systems Ltd.*, 2004 FCA 162 para. 6** [Tab 21, P243]

## **E. Conclusion**

40. Prothonotary Morneau made an error of law in deciding that there is no need for the plaintiffs to amend their amended statement of claim.

41. Prothonotary Morneau made his decision in the absence of any evidence before him.

42. Prothonotary Morneau did not provide reasons for his decision.

43. Since the plaintiff's amended statement of claim is inconsistent with the remedy sought by the plaintiff, the amended statement of claim should be amended to remove the claims related to damages sought.

44. Since the defendant incurred costs thrown away in association with the question of damages allegedly suffered by the plaintiff, these costs thrown away should be reimbursed.

45. In the event that the present motion is dismissed, no costs should be awarded, because of:

- (a) the imbalance of strength between the parties;
- (b) the serious error of the Prothonotary in not giving reasons for his decision, which would serve as the basis for review; and
- (c) the novel point of law that is raised by the question of whether a withdrawn/abandoned claim should be allowed to stand.

**PART IV – ORDER SOUGHT**

46. The Moving Party, Dr. Cooperstock, is seeking:
- (a) an Order awarding costs of this motion to the defendant;
  - (b) an Order striking out paragraphs (h) and 31 of the amended statement of claim;
  - (c) an Order awarding costs thrown away to the defendant;
  - (d) an Order pursuant to Rule 51 setting aside the the January 3, 2014 Order of Prothonotary Morneau refusing to strike out paragraphs (h) and 31 of the amended statement of claim, and refusing to award the defendant costs thrown away; and
  - (e) such further and other relief as this Honourable Court may deem just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

January 17, 2014



**DR. JEREMY COOPERSTOCK**  
392 Grosvenor Ave.  
Westmount, Québec H3Z 2M2  
Tel: 438-808-6463

*jcooperstock@gmail.com*

Defendant / Moving Party

## PART V – LIST OF AUTHORITIES

<b>STATUTES AND REGULATIONS</b>	<b>PARA. No.</b>
<i>Federal Courts Rules</i> , S.O.R./98-106, Rules 51, 181, 182, 221, 369, and 402	20, 20, 21,29
<b>CASES</b>	<b>PARA. No.</b>
<i>Canada v. Aqua-Gem Investments Ltd.</i> , 1993 2 FC 425	17
<i>T. Co. Metals LLC v. Vessel "Federal EMS"</i> , 2011 FC 1067	17
<i>Macalpine v. Executive Officers and Members of the Ontario Progressive Conservative Party</i> , 2003 CanLII 32916	19
<i>Soulos v. Korkontzilas (H.C.J.)</i> , 1990 CanLII 6751 (ON SC)	23,30
<i>Thode v. University of Ottawa</i> , 2012 ONSC 7284	23
<i>Sears Canada Inc. v. Wilson</i> , 1990 CanLII 2446	23
<i>Reading &amp; Bates Construction Co. v. Baker Energy Resources Corp.</i> , [1988] F.C.J. 1025	32
<i>Cape Breton Development Corp. v. D. Roper Services Ltd.</i> , 2002 NSSC 39	37
<i>VIA Rail Canada Inc. v. National Transportation Agency</i> , 2 FC 25	38

**CASES****PARA. No.**

*Bank of the West v. The 26' Well Craft Scarab (Ship)*,  
2007 FC 1112

39

*Infonet Services Corp. v. Matrox Electronic Systems Ltd.*,  
2004 FCA 162

39

<b>Federal Courts Rules</b> <b>S.O.R./98-106</b>	<b>Règles des Cours fédérales</b> <b>DORS/98-106</b>
<p><b>Appeal</b></p> <p><b>51.</b> (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.</p> <p><b>Service of appeal</b></p> <p>(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.</p>	<p><b>Appel</b></p> <p><b>51.</b> (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.</p> <p><b>Signification de l'appel</b></p> <p>(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.</p>
<p><b>Particulars</b></p> <p><b>181.</b> (1) A pleading shall contain particulars of every allegation contained therein, including</p> <p>(a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and</p> <p>(b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.</p>	<p><b>Précisions</b></p> <p><b>181.</b> (1) L'acte de procédure contient des précisions sur chaque allégation, notamment :</p> <p>a) des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;</p> <p>b) des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.</p>

<p><b>Claims to be specified</b></p> <p><b>182.</b> Every statement of claim, counterclaim and third party claim shall specify</p> <p>(a) the nature of any damages claimed;</p> <p>(b) where monetary relief is claimed, whether the amount claimed, exclusive of interest and costs, exceeds \$50,000;</p> <p>(c) the value of any property sought to be recovered;</p> <p>(d) any other specific relief being claimed, other than costs; and</p> <p>(e) whether the action is being proceeded with as a simplified action.</p>	<p><b>Contenu</b></p> <p>182. La déclaration, la demande reconventionnelle et la mise en cause contiennent les renseignements suivants :</p> <p>a) la nature des dommages-intérêts demandés;</p> <p>b) lorsqu'une réparation pécuniaire est réclamée, une mention indiquant si le montant demandé excède 50 000 \$, intérêts et dépens non compris;</p> <p>c) la valeur des biens réclamés;</p> <p>d) toute autre réparation demandée, à l'exclusion des dépens;</p> <p>e) le cas échéant, une mention portant que l'action est poursuivie en tant qu'action simplifiée.</p>
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<p><b>Motion to strike</b></p> <p><b>221.</b> (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it</p> <p>(a) discloses no reasonable cause of action or defence, as the case may be,</p> <p>(b) is immaterial or redundant,</p> <p>(c) is scandalous, frivolous or vexatious,</p> <p>(d) may prejudice or delay the fair trial of the action,</p> <p>(e) constitutes a departure from a previous pleading, or</p> <p>(f) is otherwise an abuse of the process of the Court,</p> <p>and may order the action be dismissed or judgment entered accordingly.</p>	<p><b>Requête en radiation</b></p> <p><b>221.</b> (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :</p> <p>a) qu'il ne révèle aucune cause d'action ou de défense valable;</p> <p>b) qu'il n'est pas pertinent ou qu'il est redondant;</p> <p>c) qu'il est scandaleux, frivole ou vexatoire;</p> <p>d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;</p> <p>e) qu'il diverge d'un acte de procédure antérieur;</p> <p>f) qu'il constitue autrement un abus de procédure.</p> <p>Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.</p>
<p><b>Motions in writing</b></p> <p><b>369.</b> (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.</p>	<p><b>Procédure de requête écrite</b></p> <p><b>369.</b> (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.</p>



<p><b>Costs of discontinuance or abandonment</b></p> <p><b>402.</b> Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.</p>	<p><b>Dépens lors d'un désistement ou abandon</b></p> <p><b>402.</b> Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.</p>
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# Canada v. Aqua-Gem Investments Ltd., [1993] 2 FC 425

Date: 1993-02-04

Docket: A-1191-91

Parallel 1993 CanLII 2939 (FCA); 47 DTC 5080; [1993] 1 CTC 186; 61 FTR 44

citations:

URL: <http://canlii.ca/t/4np7>

Citation: Canada v. Aqua-Gem Investments Ltd., 1993 CanLII 2939 (FCA), [1993] 2 FC 425,  
<<http://canlii.ca/t/4np7>> retrieved on 2014-01-11

Noteup: Search for decisions citing this decision

Reflex Related decisions, legislation cited and decisions cited

Record

canada v. aqua-gem investments ltd.

A-1191-91

**Her Majesty the Queen** (*Appellant*)

v.

**Aqua-Gem Investments Ltd.** (*Respondent*)

Indexed as: Canada v. Aqua-Gem Investments Ltd. (C.A.)

Court of Appeal, Isaac C.J., Mahoney, MacGuigan, Décary and Robertson JJ.A."Toronto, November 9, 1992; Ottawa, February 4, 1993.

Judges and courts " Per C.J. (dissenting): Whether all discretionary decisions of prothonotaries to be reviewed de novo (based on F.C.A. decision in Canada v. "Jala Godavari" (The)) or reviewed for error only in some cases " Issue of great importance as affecting efficient dispatch of Court business, utilization of judicial resources " Intention of Parliament in authorizing appointment of prothonotaries " General direction issued by A.C.J. as to powers of Senior Prothonotary, A.S.P. " Historical development of Master system in England " Canadian practice giving Masters larger discretion " Exhaustive review and exposition of law relating to Masters " Constitutional issues " Proper standard of review of discretionary orders of F.C. prothonotaries " Necessity for balancing judicial due process on questions vital to final issue of case with administrative expedition in routine matters " Authority of prothonotaries should not be limited as suggested in Canada v. "Jala Godavari" (The).

Practice " Dismissal of proceedings " Want of prosecution " Appeal from Order of Motions Judge setting aside A.S.P.'s denial of order staying or dismissing Crown's action for want of prosecution " Action commenced in 1986, delayed more than three years " Delay inordinate, inexcusable, likely to cause prejudice to respondent.

This was an appeal from an order of the Motions Judge setting aside the dismissal by the Associate Senior Prothonotary of respondent's motion for an order staying the proceeding under [paragraph 50\(1\)\(b\)](#) of the [Federal Court Act](#) or dismissing it for want of prosecution under R. [440](#). The respondent, a firm which specializes in buying and reviving failing businesses, sought to treat certain types of expenses as "active business income" for its 1979, 1980 and 1981 taxation years. The Minister of National Revenue treated the amounts in question as "Canadian investment income", thus subjecting them to a higher tax liability. The respondent appealed the Minister's assessment to the Tax Court of Canada which ruled in its favour. The Minister appealed that decision and filed a statement of claim in the Federal Court, Trial Division in July 1986. For various reasons, the case was delayed until March 1988 and again until September 1991, at which time the Associate Senior Prothonotary heard the respondent's motion for an order dismissing the appellant's action for want of prosecution, and dismissed it. The Motions Judge allowed the appeal from that decision, pointing out that "the delay on the plaintiff's part has been of such substantial proportion as to likely cause prejudice to the defendant at trial". The main issue was whether the Motions Judge applied the proper standard of review to the discretionary decision of the Prothonotary when he relied upon the standard enunciated by the Federal Court of Appeal in *Canada v. "Jala Godavari" (The)*.

*Held* (Isaac C.J. and Robertson J.A. dissenting): the appeal should be dismissed.

*Per* MacGuigan J.A. (Mahoney and Décaré JJ.A. concurring): Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless 1) they are clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or 2) they raise questions vital to the final issue of the case. In such cases, a judge ought to exercise his own discretion *de novo*. In the *Jala Godavari* case, the Court of Appeal, contrary to a view so far adopted in the Trial Division that the prothonotary's discretion should be followed unless he had committed an error of law, ruled that a judge who hears an appeal from a prothonotary on a matter involving the exercise of discretion is called upon to exercise his own discretion and is not bound by the prothonotary's opinion. This case should not be read as meaning that the prothonotary's discretion should never be respected, but that it is subject to an overriding discretion by a judge where the question involved is vital to the final issue of the case. The question before the prothonotary herein can be considered interlocutory only because he decided it in favour of the appellant. If he had decided it for the respondent, it would have been a final decision in the case. A decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. The Motions Judge was right in following the *Jala Godavari* case and exercising his own discretion *de novo*. In concluding "solely on the grounds that the defendant had not complained of the plaintiff's tardiness or taken some action at an earlier date", the prothonotary made an error of law which prevented him from exercising his discretion properly. This would also justify the Motions Judge's exercise of discretion *de novo*. The prothonotary's fundamental error was in assuming that the respondent was under

an obligation to take action in response to the draft statement of facts.

The Motions Judge properly exercised his discretion by taking into consideration all relevant factors, including the question of whether the subsequent delay by the respondent was sufficient to excuse the appellant's failure to prosecute in a reasonable and timely manner. He did not find the respondent's lack of response to amount to condonation, acquiescence or waiver. Nor did he err in law in considering how serious was the prejudice caused by the delay and he raised the question properly in saying: "the defendant must show . . . that it will likely be seriously prejudiced by the delay". There was no manifest error of law on the Motions Judge's part such as would permit the Court to interfere with his exercise of discretion.

*Per* Isaac C.J. (dissenting): The first issue was whether the Motions Judge applied the proper standard of review to the discretionary decision of the Associate Senior Prothonotary. Any standard adopted must recognize Parliament's intention, embodied in [section 12](#) of the [Federal Court Act](#), that the office of prothonotary is designed to aid in "the efficient performance of the work of the Court". A standard of review which subjects all impugned decisions of prothonotaries to hearings *de novo* regardless of the issues involved in the decision or whether they decide the substantive rights of the parties would be inconsistent with the statutory objective. The standard of review laid down in *Jala Godavari* is incomplete; therefore, the Motions Judge, who relied on it, did not apply the proper standard of review to the discretionary order of the Associate Senior Prothonotary.

The second issue was whether the Motions Judge erred in allowing the respondent's appeal and setting aside the order of the Associate Senior Prothonotary. With respect to the first branch of the standard of review, whether the order of the Associate Senior Prothonotary was clearly wrong, there was no allegation that the latter misapprehended the facts. It was largely because he had taken into account the conduct of the respondent in the litigation that the Motions Judge found him to have been in error. In taking such conduct into account, the Associate Senior Prothonotary was acting in accordance with well-settled principles which have been accepted by the Federal Court. The level of litigious activity or inactivity on the part of the defendant is a relevant factor to be taken into account in determining whether a delay has been inordinate or inexcusable, and whether a party has been seriously prejudiced by it. In arriving at his conclusion, the Associate Senior Prothonotary did not act on a wrong principle and his order was not clearly wrong. As to the second branch of the standard, namely whether the order of the Prothonotary raised questions vital to the final issue of the case, the Motions Judge was not justified in refusing deference to the discretion of the Associate Senior Prothonotary and exercising his own. The order in question was interlocutory: it did not decide the substantive rights of the parties or any issue vital to the final issue of the litigation. Its sole effect was that the appellant was entitled to proceed to trial in accordance with the rules and practice of the Court. Delay in prosecution was not an issue in dispute in the action. The test to be applied in dismissing an action for want of prosecution is whether there has been an inordinate delay, whether that delay was inexcusable and whether the defendant is likely to be seriously prejudiced by the delay. The Associate Senior Prothonotary considered each element of this test in reaching his conclusion, albeit in different language. The Motions Judge erred in allowing the respondent's appeal and setting aside the order of the Prothonotary.

*Per* Robertson J.A. (dissenting): The Motions Judge erred in applying the test on which decisions to dismiss actions for want of prosecution must be based. The two-year delay was "inexcusable" and "inordinate" but it remained to be determined whether the respondent was "likely to be seriously prejudiced by the delay". One should not presume serious prejudice because the delay is deemed inordinate. Moreover, it is doubtful whether the "fading memory" rationale could be invoked as the sole basis on which to rest a decision to dismiss for want of prosecution. The burden of demonstrating sufficient prejudice is not easily met. Courts should not assess the likelihood of serious prejudice in a factual vacuum. The respondent offered no specific evidence which could reasonably be regarded as giving rise to a likelihood of serious prejudice. Its admission that "there was substantial evidence from the witness at the trial in the Tax Court" undermines the validity of the "fading memory" rationale and, if necessary, would rebut any presumption of prejudice. An order dismissing an action for want of prosecution is not intended to punish a plaintiff for its failure to proceed expeditiously. Its aim is to ensure that defendants are not exposed to "a substantial risk that a fair trial of the issues in the litigation will not be possible". The respondent failed to adduce the evidence necessary to demonstrate that it would be unable to obtain a fair trial on the issues.

statutes and regulations judicially considered

*An Act for the division of the Province of Lower-Canada, for amending the Judicature thereof, and for repealing certain Laws therein mentioned* [34 Geo. III, c. 6] 1793.

*An Act to amend the Exchequer Court Act*, S.C. 1920, c. 26, s. 3.

*An Act to amend the Exchequer Court Act*, S.C. 1957, c. 24, s. 1.

*An Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16, s. 9.

[\*Code of Civil Procedure\*, R.S.Q., c. C-25, art. 41, 42, 44.1, 511.](#)

[\*Constitution Act, 1867\*, 30 & 31 Vict., c. 3 \(U.K.\)](#) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the [\*Constitution Act, 1982\*](#), Item 1) [R.S.C., 1985, Appendix II, No. 5], [s. 101](#).

*Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 4.

*Exchequer Court Act*, R.S.C. 1927, c. 34, s. 87(2).

*Exchequer Court Act*, R.S.C. 1952, c. 98.

*Exchequer Court General Rules and Orders*, Rule 1A(4).

[\*Federal Court Act\*, R.S.C., 1985, c. F-7, ss. 3, 12, 46\(1\), 50\(1\).](#)

*Federal Court Rules*, C.R.C., c. 663, RR. 331A (as enacted by SOR/79-57, s. 6), 336, 440, 447(2), 460 (as am. by SOR/90-846, s. 15).

*Income Tax Act*, R.S.C. 1952, c. 148, s. 175(3) (as am. by S.C. 1988, c. 61, s. 21).

*Judicature Act*, S.N.S. 1972, c. 2.

*The Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 70.

cases judicially considered

applied:

*Evans v. Bartlam*, [1937] A.C. 473 (H.L.); *Stoicevski v. Casement* [1983 CanLII 1679 \(ON CA\)](#), (1983), 43 O.R. (2d) 436 (C.A.); revg (1983), 33 C.P.C. 145 (Div. Ct.); *Canada v. "Jala Godavari" (The)* [reflex](#), (1991), 40 C.P.R. (3d) 127; 135 N.R. 316 (F.C.A.); *Allen v. McAlpine (Sir Alfred) & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.); *The Queen v. Murphy and ABC Steel Building Ltd.* (1988), 89 DTC 5028; 99 N.R. 75 (F.C.A.); *Canadian National Railway Co. v. The Norango*, [1976] 2 F.C. 264 (F.C.A.).

considered:

*Adamson v. Adamson et al* (1888), 12 P.R. 469 (Ont. H.C.); *Odell v. Mulholland* (1891), 14 P.R. 180 (Ont. H.C.); *Quality Steels (London) Ltd. v. Atlas Steels Limited*, [1949] O.W.N. 110 (H.C.); *Marleen Investments Ltd. v. McBride et al.* [1979 CanLII 1895 \(ON SC\)](#), (1979), 23 O.R. (2d) 125; 13 C.P.C. 221; 27 Chitty's L.J. 69 (H.C.); *King v. Drysdale et al.* (1892), 24 N.S.R. 308 (S.C.); *Starratt v. White* (1913), 11 D.L.R. 488; 47 N.S.R. 163 (S.C.); *Alta. Wheat Pool v. Nahajowicz* [reflex](#), (1930), 24 Alta. L.R. 400; [1930] 2 D.L.R. 759; [1930] 1 W.W.R. 483 (S.C.A.D.); *Wright v. Disposal Services Ltd. and Marsh* [1977 CanLII 619 \(AB QB\)](#), (1977), 8 A.R. 394; 80 D.L.R. (3d) 671; 4 Alta. L.R. (2d) 173 (S.C.); *274099 Alberta Ltd. v. West Edmonton Mall Shopping Centre Ltd. et al.* (1990), 114 A.R. 57; 75 Alta. L.R. (2d) 389 (C.A.); *Abermin Corp. v. Granges Explor. Ltd.* [1990 CanLII 1352 \(BC SC\)](#), (1990), 45 B.C.L.R. (2d) 188; 42 C.P.C. (2d) 25 (S.C.); *Re Solloway Mills & Co.*, [1934 CanLII 157 \(ON CA\)](#), [1935] O.R. 37; [1935] 2 D.L.R. 549 (C.A.); *Iscar Ltd. v. Karl Hertel GmbH*, [reflex](#), [1989] 3 F.C. 479; (1989), 25 C.P.R. (3d) 116; 27 F.T.R. 186 (T.D.); *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* [reflex](#), (1988), 22 C.I.P.R. 240; 24 C.P.R. (3d) 66; 25 F.T.R. 226 (F.C.T.D.); *Do Carmo v. Ford Excavations Pty Ltd*, [1981] 1 N.S.W.L.R. 409 (S.C.); overd in part [1981] 2 N.S.W.L.R. 253 (C.A.); vard (1984), 58 A.L.J.R. 287 (Aust.H.C.); *Farrar v. McMullen*, [1970 CanLII 555 \(ON CA\)](#), [1971] 1 O.R. 709 (C.A.); *Nichols v. Canada et al.* [reflex](#), (1990), 36 F.T.R. 77 (F.C.T.D.); *Birkett v. James*, [1978] A.C. 297 (H.L.); *Department of Transport v. Chris (Smaller) Transport Ltd.*, [1989] A.C. 1197 (H.L.).

referred to:

*Ensite Ltd. v. R.*, [1986 CanLII 41 \(SCC\)](#), [1986] 2 S.C.R. 509; (1986), 33 D.L.R. (4th) 491; [1986] 2 C.T.C. 459; 86 DTC 6521; 70 N.R. 189; *Aqua-Gem Investments Ltd. v. M.N.R.*, [reflex](#), [1986] 1 C.T.C. 2528; 86 D.T.C. 1392 (T.C.C.); *Sculthorpe v. Burn* (1866), 12 Gr. 427 (U.C.Ch); *Branche v. MacArthur et al.* [1986 CanLII 2750 \(ON SC\)](#), (1986), 56 O.R. (2d) 71; 30 D.L.R. (4th) 301; 11 C.P.C. (2d) 8; 16 O.A.C. 306 (Div. Ct.); *Wink (John) Ltd. v. Sico Inc.* [1987 CanLII 4299 \(ON SC\)](#), (1987), 57 O.R. (2d) 705; 15 C.P.C. (2d) 187 (H.C.); *Das v. Coles* [1989 CanLII 4212 \(ON SC\)](#), (1989), 71 O.R. (2d) 57; 64 D.L.R. (4th) 345



(H.C.); *Hart v. Kowall* [1990 CanLII 6700 \(ON SC\)](#), (1990), 75 O.R. (2d) 306; 74 D.L.R. (4th) 126 (Gen. Div.); *L.C.D.H. Audio Visual Ltd. v. I.S.T.S. Verbatim Ltd. et al.* [1986 CanLII 2758 \(ON SC\)](#), (1986), 54 O.R. (2d) 425; 40 B.L.R. 128; 8 C.P.C. 141 (H.C.); *Fazzari et al. v. Pellizzari et al.* [reflex](#), (1988), 28 O.A.C. 38 (Div. Ct.); *Lacaud c. Leblanc*, [1983] C.S. 555 (Que. S.C.); *Johnson Products Co. v. Truso Ltd.* [reflex](#), (1987), 12 C.I.P.R. 22; 15 C.P.R. (3d) 76 (F.C.T.D.); *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1987), 12 C.I.P.R. 260 (F.C.T.D.); *Westinghouse Electric Corp. et al. v. Babcock & Wilcox Industries Ltd. (trading under name and style Bailey Controls et al.)* [reflex](#), (1987), 15 C.P.R. (3d) 447; 15 F.T.R. 154 (F.C.T.D.); *Standal Estate v. Swecan International Ltd.* [reflex](#), (1989), 24 C.I.P.R. 298; 25 C.P.R. (3d) 104; 27 F.T.R. 1 (F.C.T.D.); *Syntex Inc. v. Novopharm Ltd.* [reflex](#), (1989), 24 C.I.P.R. 144; 24 C.P.R. (3d) 371; 28 F.T.R. 118 (F.C.T.D.); *Unilever PLC v. Proctor & Gamble Inc.* [reflex](#), (1989), 23 C.I.P.R. 237; 24 C.P.R. (3d) 388 (F.C.T.D.); *David et al. v. Kluger et al.* [reflex](#), (1991), 51 F.T.R. 234 (F.C.T.D.); *Prouvost S.A. v. Munsingwear Inc.*, [reflex](#), [1992] 2 F.C. 541 (C.A.); *Canastrand Industries Ltd. v. Lara S (The)*, [reflex](#), [1992] 3 F.C. 398 (T.D.); *Ruhrkohle Handel Inter GMBH v. Federal Calumet (The)*, [reflex](#), [1992] 3 F.C. 98 (C.A.); *Norton Co. v. Lionite Abrasives Ltd.* (1975), 32 C.P.R. (2d) 270 (F.C.T.D.); *Minnesota Mining and Manufacturing Company v. Lorcon Inc.*, [1984] 1 F.C. 380; (1984), 73 C.P.R. (2d) 176 (T.D.); *McGregor and McGregor v. Canada* [reflex](#), (1988), 20 F.T.R. 122 (F.C.T.D.); *Hendrickson v. Kallio*, [1932 CanLII 123 \(ON CA\)](#), [1932] O.R. 675 (C.A.); *Bozson v. Altrincham Urban Council*, [1903] 1 K.B. 547 (C.A.); *Walkley v. Precision Forgings Ltd.*, [1979] 2 All E.R. 548 (H.L.); *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn. Ltd.*, [1981] A.C. 909 (H.L.); *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] A.C. 854 (H.L.); *A-G of Canada v. S.F. Enterprises Inc. et al.* (1990), 90 DTC 6195; 107 N.R. 100 (F.C.A.); *Ainsworth v. Bickersteth et al.*, [1947 CanLII 122 \(ON CA\)](#), [1947] O.R. 525; [1947] 3 D.L.R. 517 (C.A.).

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APPEAL from the order of a Motions Judge ((1991), 91 DTC 5641; 50 F.T.R. 115 (F.C.T.D.)) setting aside an order of the Associate Senior Prothonotary ((1991), 91 DTC 5546 (F.C.T.D.)) dismissing the respondent's motion for an order staying the proceeding under [paragraph 50\(1\)\(b\)](#) of the [Federal Court Act](#) or dismissing it for want of prosecution under [Rule 440](#). Appeal dismissed.

#### counsel:

*Harry Erlichman and Laura C. Snowball* for appellant.

*Richard G. Fitzsimmons and Daniel F. Chitiz* for respondent.

#### solicitors:

Deputy Attorney General of Canada for appellant.

*Fitzsimmons, MacFarlane, Slocum & Harpur*, Toronto, for respondent.

*The following are the reasons for judgment rendered in English by*

Isaac C.J. (*dissenting*): This is an appeal from the order of a Motions Judge in the Trial Division dated November 8, 1991 [91 DTC 5641], allowing an appeal by the respondent made pursuant to Rule 336(5) of the *Federal Court Rules* [C.R.C., c. 663] from an order of the Associate Senior Prothonotary [(1991), 91 DTC 5546]. By his order, the Motions Judge set aside, with costs, the order of the Associate Senior Prothonotary which dismissed the respondent's motion for, *inter alia*, an order staying the proceeding pursuant to [paragraph 50\(1\)\(b\)](#) of the [Federal Court Act \[R.S.C., 1985, c. F-7\]](#) or, alternatively, dismissing it for want of prosecution pursuant to [Rule 440](#).

The order in appeal had the effect of dismissing the appellant's action for want of prosecution.

The sole ground of objection to the order, alleged by the appellant in its memorandum of fact and law, was that the Motions Judge erred in dismissing the action for want of prosecution, but when the appeal came on for hearing, the Court, of its own motion, by order dated October 5, 1992, directed the parties to submit argument on the following question:

Whether the Motions Judge applied the proper standard of review to the discretionary decision of the Prothonotary when he relied upon the standard enunciated by Hugessen J.A. in *The Ship "Jala Godavari" et al v. The Queen et al . . .*

## THE FACTS

The respondent, incorporated in 1975, is a firm which, *inter alia*, specializes in buying and reviving failing businesses. In computing its business income for the 1979, 1980 and 1981 taxation years, it sought to treat certain types of expenses as "active business income" in order to obtain the benefit of the small business deduction and refundable dividend provisions of the *Income Tax Act*.<sup>1\*</sup> R.S.C. 1952, c. 148 (as am. by S.C. 1970-71-72, c. 63). The Minister of National Revenue (the "Minister") disagreed. In 1983, in reassessing the respondent's income tax returns for those years, the Minister treated all of the amounts in question as "Canadian investment income", thus subjecting them to a higher tax liability.

The respondent appealed the Minister's assessment to the Tax Court of Canada. The notice of appeal was filed on February 10, 1984. The Court heard the appeal on May 31, 1985 and rendered its decision on April 24, 1986.<sup>2\*</sup> The decision of the Tax Court is reported at [reflex](#), [1986] 1 C.T.C. 2528.

On the appeal to the Tax Court, the respondent conceded the Minister's position concerning some of the expenses. However, the Court decided in its favour over the allocation of certain interest income. The Minister appealed that decision to the Trial Division of this Court in accordance with the provisions of the *Income Tax Act*.<sup>3\*</sup> Under the former s. 175(3) of the *Income Tax Act* (repealed and replaced by S.C. 1988, c. 61, s. 21, in force January 1, 1991), an appeal of a decision of the Tax Court was to be treated for the most part like a trial,



with most of the Rules relating to ordinary actions applying.

The Minister filed his statement of claim in the Trial Division on July 29, 1986. At the request of the respondent, the Minister agreed to a delay in the filing of the respondent's defence until the Supreme Court of Canada had delivered its decision in *Ensite Ltd. v. R.*, [1986 CanLII 41 \(SCC\)](#), [1986] 2 S.C.R. 509, a case which involved roughly analogous facts and which the respondent thought could affect its position in this case. After the Supreme Court rendered its decision on November 6, 1986, the Minister indicated his intention to proceed with the appeal, and the respondent said that it would "endeavour" to file its defence by January, 1987. On March 9, 1987, the respondent's solicitor wrote to the appellant's solicitor enclosing the statement of defence for service.

On March 13, 1987, the solicitor for the Minister wrote to the solicitor for the respondent suggesting that they exchange lists of documents and make arrangements for examinations for discovery. No further communication appears to have passed between the parties until March 23, 1988, when the Minister's solicitor forwarded his list of documents to the respondent's solicitor and asked for the respondent's list in return. The Minister's solicitor also suggested that the parties should attempt to agree on the facts and thereby obviate the need for discoveries, since the facts were "hardly in dispute." On March 29, 1988, the solicitors agreed by telephone that the solicitor for the Minister would prepare a draft statement of facts. There is no evidence that this agreement was ever terminated or that the respondent did deliver its list of documents.

On May 14, 1990 (over two years after the previous exchange of correspondence), the solicitor for the Minister sent the solicitor for the respondent a copy of its draft statement of agreed facts and asked for comments. The solicitor for the respondent did not respond. On October 24, 1990, the solicitor for the Minister wrote again, requesting a response. He received none. On January 15, 1991, the solicitor for the Minister wrote a third time as follows:

A draft of the Statement of Agreed Facts was sent on May 14, 1990 for your perusal. I have not had any response from you despite a reminder dated October 24, 1990.

May I please hear from you whether or not you intend to proceed with this appeal. In reviewing your position you might take into account the views of the Tax Court expressed in *McCutcheon Farms Ltd. v. M.N.R.*, 88 DTC 1208 at pages 1214-25 on the reasons behind the Tax Court's decision in *Aqua-Gem*.

To this the respondent's solicitor replied by serving on the appellant's solicitor, a notice of motion returnable on June 10, 1991 in the Trial Division for the relief mentioned earlier.

The motion was adjourned by the parties *sine die* and was heard by the Associate Senior Prothonotary in Toronto on September 30, 1991.

## THE JUDGMENTS BELOW

### a) Reasons of the Associate Senior Prothonotary

On September 30, 1991, the Associate Senior Prothonotary heard the motion and dismissed it.

On October 8, 1991, he delivered written reasons for his decision. In his reasons, the Associate Senior Prothonotary reviewed the procedural history of the action and the correspondence passing between the solicitors for the parties. He then stated [at pages 5546-5547]:

The time that has passed since the occurrence of the facts giving rise to this action (which is a tax appeal) is sufficient for any witness to have forgotten many of the circumstances. Defendant's counsel, however, admitted that there was substantive evidence from the witness at the trial in the Tax Court and no doubt transcripts of that testimony will go far to refresh the witness's memory. The delay prior to March, 1987 [*i.e.* the period prior to Aqua-Gem's filing its defence] was either by agreement awaiting the Supreme Court decision or by delay of the defendant. The delay immediately after March 1987 was in not filing document lists. Both sides were required to file such lists, neither did so. Over a year later, in March 1988, the plaintiff [*i.e.* Crown] supplied a list. The defendant might at that time have moved or complained of a fresh step being taken after a year's delay. The defendant did not do so. The parties communicated and on the 28th of March 1988, the plaintiff agreed to draft a Statement of Facts in the hope that an Agreed Statement of Facts might be used to shorten proceedings. The plaintiff did not supply the draft Agreed Statement of Facts for over two years. When the plaintiff finally supplied the draft in May of 1990, the defendant could again have moved or complained. Over the next year, the plaintiff twice sought replies and received none. The delay of two years up until May, 1990 as I say, might well have supported a successful motion to dismiss brought about at that time. The defendant, however, did nothing. Twice the defendant was reminded. The next step in the proceedings which were apparently agreed to by the parties in March of 1988 was for the defendant to react to the draft Agreed Statement of Facts which it did not do. Having apparently excused a one year delay prior to March 1988, and a further two year delay prior to May 1990, or if it did not excuse those delays to have done nothing about either of them until June of 1991. [sic] The defendant cannot be heard to complain at this late date of the plaintiff's failure to proceed expeditiously at earlier times nor of the plaintiff's failure to react to the defendant's delays in commenting on the Agreed Statement of Facts. For these reasons I dismissed the defendant's motion. [Emphasis added.]

#### b) Reasons of the Motions Judge

The respondent appealed from the order of the Associate Senior Prothonotary by motion brought pursuant to Rule 336(5) of the *Federal Court Rules*, according to the practice of the Court.

In its notice of motion the respondent sought, *inter alia*, an order reversing the order of the Associate Senior Prothonotary on several grounds, but in essence it claimed that the Associate Senior Prothonotary had erred in not staying or dismissing the appellant's action.

I digress here to observe that in argument before us counsel for the appellant stated that he took the position before the Associate Senior Prothonotary that despite the alternative claim for relief the respondent's motion was properly one for dismissal for want of prosecution pursuant to Rule 440 of the *Federal Court Rules* and not for a stay pursuant to [subsection 50\(1\)](#) of the *Federal Court Act*, ("the [Act](#)").<sup>4</sup>\*ftnote<sup>4</sup> [R.S.C., 1985, c F-7](#). It would appear that the Associate Senior Prothonotary accepted that position because he decided the motion

on that basis.

After he had reviewed the facts, the Motions Judge outlined his approach to the appeal in the following terms [at page 5642]:

The first point I wish to make concerns the function of a trial judge of this court when hearing an appeal from a decision of a prothonotary. It is now established that in cases of this nature, a judge is not only permitted to exercise his or her own discretion, but is required to do so. Furthermore, there is no obligation on the court to accept the views of the prothonotary. This principle was set out by the Federal Court of Appeal in *The Ship "Jala Godavari" et al. v. The Queen et al.* (A-112-91, October 18, 1991), wherein Hugessen, J.A. writing for the court made the following statement:

In this latter connection we would add that, contrary to a view that has sometimes been expressed in the Trial Division, a judge who hears an appeal from a prothonotary on a matter involving the exercise of discretion is called upon to exercise his own discretion and is not bound by the prothonotary's opinion. He may, of course, choose to give great weight to the views expressed by the prothonotary, but the parties are, in the final analysis, entitled to the discretion of a judge and not that of a subordinate officer.

It was this passage in the reasons of the Motions Judge which caused the Court to require argument on the issue of whether the proper standard of review had been applied to the order of the Associate Senior Prothonotary.

Following his description of the scope of review, the Motions Judge stated that he would allow the appeal. In justifying his conclusion he said [at pages 5642-5643]:

In order to succeed on an application to dismiss an action for want of prosecution, the defendant must show that there has been inordinate delay which is inexcusable and that it will likely be seriously prejudiced by the delay. The general rule is that the longer the delay, the greater the likelihood of serious prejudice at the trial as the passage of time weakens witnesses' recollection of events.

I am satisfied that the defendant has successfully shown these elements in the present case. Indeed, it is not seriously contested here that there has been inordinate delay on the part of the plaintiff. Giles, A.S.P. noted in his Reasons that "the time that has passed since the occurrence of the facts giving rise to this action (which is a tax appeal) is sufficient for any witness to have forgotten many of the circumstances." Accordingly, it is appropriate that the plaintiff's action be dismissed for want of prosecution.

The fact that plaintiff's delay in prosecuting this case is sufficient to warrant an order dismissing the action is not, under the circumstances, altered by any subsequent delay on the part of the defendant. The implication that the defendant's lack of action excused the plaintiff's failure to prosecute in a reasonable and timely manner is simply not correct.

...

I am of the view that the Associate Senior Prothonotary was in error when he refused to grant the motion for want of prosecution solely on the grounds that the defendants had not

complained of the plaintiff's tardiness or taken some action at an earlier date. It is clear on the facts that the delay on the plaintiff's part has been of such substantial proportion as to likely cause prejudice to the defendant at trial. [Emphasis added.]

## THE ISSUES

As reconstituted, the following two issues arose for determination in this appeal and were fully canvassed by counsel for the parties:

1. Whether the Motions Judge applied the proper standard of review to the discretionary decision of the Associate Senior Prothonotary.
2. Whether the Motions Judge erred in allowing the Respondent's appeal and setting aside the order of the Associate Senior Prothonotary.

I will deal with each issue in turn.

1. Whether the Motions Judge applied the proper standard of review to the discretionary decision of the Associate Senior Prothonotary.

I observe at the outset that this issue is of great importance, since it touches directly upon the efficient dispatch of the business of the Court and the proper utilization of judicial resources. Simply stated, the competing considerations are whether all discretionary decisions of prothonotaries are to be reviewed by hearings *de novo*, as the Motions Judge has concluded, based on the decision in *Canada v. "Jala Godavari" (The)* [reflex](#), (1991), 40 C.P.R. (3d) 127 (F.C.A.), or whether they should be reviewed for error only in some or all cases. If only in some, how should such cases be defined?

Resolution of this issue requires an appreciation of the role of prothonotaries and the nature of the functions they perform in this Court. It is necessary to an understanding of that role and those functions to review their legislative underpinnings.

By [section 3](#) of the [Federal Court Act](#), Parliament continued in this Court, as a superior court of civil and criminal jurisdiction, the authority formerly exercised by the Exchequer Court of Canada. As is well known, the Exchequer Court employed a Registrar or Master to assist in its work.<sup>5</sup> The office of Registrar has existed since the founding of the Court. Initially, the position of Registrar of both the Supreme Court of Canada and the Exchequer Court was occupied by the same individual (*The Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 70), but in 1887, the position of Registrar of the Exchequer Court was constituted as a separate office (*An Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16, s. 9). Like the prothonotaries in this Court, the Registrar of the Exchequer Court was required to be a barrister.

The constituent authority for the office of Registrar had to be amended periodically to provide for an increase in salary until, by [*An Act to amend the Exchequer Court Act*] S.C. 1957, c. 24, s. 1, his salary was thereafter to be determined by the Governor in Council, but the express authorization for the exercise of judicial authority by him was enacted by [*An Act to amend the Exchequer Court Act*] S.C. 1920, c. 26, s. 3. It added a new subs. 13(2) to the [Act](#),

which provided:

**13. . . .**

(2) In addition to any powers, jurisdiction and authority conferred upon the Registrar by this or any other statute of Canada, the Judges of the Exchequer Court of Canada may, by any general rule or order made under the provisions of section eighty-seven of this [Act](#) [*i.e.* the provision which authorized the judges of the Court to make rules], empower the Registrar to do any such thing and transact any such business as is specified in such rules or orders, and to exercise any authority and jurisdiction in respect of the same as is now or may be hereafter done, transacted or exercised by a Judge of the Court sitting in Chambers in virtue of any statute or custom or by the practice of the Court.

In the 1927 revision of the public general statutes [*Exchequer Court Act*, R.S.C. 1927, c. 34] this provision was incorporated (with slight grammatical modifications of no consequence to this case) as ss. 87(2), where it remained throughout the remainder of the life of the Exchequer Court (see *Exchequer Court Act*, R.S.C. 1952, c. 98). In their last form prior to the creation of this Court, the "semi-judicial powers", as they were entitled, were embodied in *Exchequer Court General Rules and Orders*, Rule 1A. By virtue of Rule 1A(4), the Registrar could be referred to as the Master of the Court.

The Act provides, in [section 12](#), for the continuation of the function performed by these officers, by authorizing the appointment of prothonotaries. [Section 12](#) defines the powers, duties, functions and status attaching to the office of prothonotary in the following terms:

**12.** (1) The Governor in Council may appoint as prothonotaries of the Court such fit and proper persons who are barristers or advocates in a province as are, in his opinion, necessary for the efficient performance of the work of the Court that, under the Rules, is to be performed by them.

(2) The Governor in Council shall designate one of the prothonotaries to be Senior Prothonotary and one of the prothonotaries to be Associate Senior Prothonotary.

(3) The powers, duties and functions of the prothonotaries shall be determined by the Rules.

(4) Each prothonotary shall be paid a salary to be fixed by the Governor in Council.

(5) For the purposes of the *Public Service Superannuation Act*, a prothonotary shall be deemed to be employed in the Public Service.

In the exercise of the rule-making authority given in [paragraph 46\(1\)\(h\)](#) of the [Act](#) to make rules "empowering a prothonotary to exercise any authority or jurisdiction, subject to supervision by the Court even though the authority or jurisdiction may be of a judicial nature", the Court has promulgated [Rule 336](#) which enumerates the duties which a prothonotary may perform. For convenience, I reproduce relevant portions of that Rule:

[Rule 336.](#) (1) Notwithstanding Rule 326(1), a prothonotary shall have power

(a) to do anything that he is by these Rules authorized to do,

(b) if he is satisfied that all parties affected have consented thereto, to make any order that the Trial Division may make other than

(i) an order that is inconsistent with an order previously made by the Court or a judge, or

(ii) an order fixing a date or place of trial,

(c) if he is satisfied that all parties affected have consented thereto, to give a judgment disposing of an action,

(d) to deliver any judgment and make any order that the Court may deliver or make under Rules 432 to 437,

(e) to make any order that the Court might make granting leave to issue a writ of execution or extending the validity of a writ of execution,

(f) to hear and dispose of any action in which the amount involved does not exceed \$5,000 that has been assigned to him by a special direction of the Associate Chief Justice, or

(g) to dispose of any interlocutory application assigned to him specially or to any prothonotary, by special or general direction of the Chief Justice or of the Associate Chief Justice,

and, in exercising his powers, a prothonotary shall, ordinarily, sit in a hearing room open to the public, but, except in a matter under paragraph (f), failure to do so shall not invalidate anything done by him.

...

(3) Every order or decision made or given by a prothonotary under this Rule is as valid and binding on all parties concerned as if it had been made or given by the Court.

The supervision required by Parliament in [paragraph 46\(1\)\(h\)](#) is found in Rule 336(5), which provides for a right of appeal from all orders of prothonotaries, and which reads:

[Rule 336](#)....

(5) Any person affected by an order or decision of a prothonotary, other than a judgment under Rule 432 to 437 [which deal with default judgments], may appeal therefrom to the Court and such appeal shall be made by an application of which a notice shall be given to all interested parties setting forth the grounds of objection and served within 14 days after the order or decision complained of, and 4 clear days before the day fixed for hearing the same, or served within such other time as may be allowed by the Court or a prothonotary on *ex parte* application. The appeal shall be filed not later than 2 days before the date named for hearing (In this paragraph, "Court" means "Trial Division", if the matter is in the Trial Division and "Court of Appeal", if the matter is in the Court of Appeal).

On October 31, 1985, the Associate Chief Justice, acting under the authority of Rule 336(1)(g), issued a general direction respecting the powers of prothonotaries in relation to the

hearing and disposition of interlocutory applications in the Trial Division. In that direction, the Associate Chief Justice stated that the Senior Prothonotary and the Associate Senior Prothonotary were empowered to hear and dispose of any interlocutory application in the Trial Division except one falling within five classes of matters specifically enumerated therein.

Doubtless, in providing for the office of the Registrar or Master in the Exchequer Court and of the prothonotary in this Court, Parliament was mindful of the pre-trial and post-judgment support which the master system provided for superior court judges in the judicial systems of England and Ontario, both of which made extensive use of these judicial officers.

In his Hamlyn Lectures (published under the title *The Fabric of English Civil Justice*, London: Stevens & Sons, 1987), Sir Jack Jacob, Q.C., himself a former senior master of the High Court of Justice in England, sketched the historical development of the master system in England and the manner of its operation. The following passage at pages 110-111 is instructive of the historical evolution of that system:

The most striking feature of the English pre-trial process is that, save for a few exceptions, the proceedings are conducted not before a judge but before a junior judicial officer, called the Master or Registrar. Before 1837, the judges of the three superior common law courts themselves dealt with pre-trial applications, which were then comparatively few in number and in variety. In 1837, Parliament abolished a great number of administrative and a few quasi-judicial offices and in their place created the Masters of the three Common Law Courts to assist the judges in their pre-trial work. In 1867, Parliament took the bold leap forward to transform the position of the Master from being an assistant to the judge into becoming a separate, distinct and independent judicial officer. This was achieved by enabling the judges to make rules of court empowering the Masters to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by the judge in Chambers, except in specified matters and proceedings. Needless to say, the requisite rules of court were immediately made and they have continued with considerable expansion to this day. They operate to confer on the Masters original jurisdiction in respect of the matters and proceedings that come before them. For these purposes in the High Court, the Master is the equivalent of the judge in Chambers and his decision, order or judgment is made or given in his capacity as "the court" itself.

The jurisdiction of the Masters, which has from time to time since their creation been greatly expanded, is very extensive indeed and covers almost the entire range of pre-trial proceedings, with the important exception of applications for an injunction, other than in agreed terms, and it also extends to almost all post-judgment proceedings. They have power to make final as well as interlocutory orders and to give final judgments which are as operative and enforceable and which must be complied with as if made or given by a judge.

There is no doubt that the office and functions of a master in superior courts of civil jurisdiction in the common law provinces in Canada is an inheritance of the colonial past, but from an early date Canadian practice seems to have diverged from that of England. So it was that as long ago as 1866, in *Sculthorpe v. Burn* (1866), 12 Gr. 427 (U.C. Ch), Mowat V.C. could say that, in pre-confederation Ontario, masters had been invested with a "larger discretion" than their counterparts in England.



In the early years of Confederation, the question of the proper standard of review of the discretionary decisions of masters by motions judges in provincial superior courts arose for consideration. Two distinct lines of authority emerged and they persist to the present time.

In Ontario, in *Adamson v. Adamson et al* (1888), 12 P.R. 469 (Ont. H.C.) at page 471, Chancellor Boyd accepted as settled that, "the rule is not to interfere unless the order appealed from is clearly wrong". To the same effect is *Odell v. Mulholland* (1891), 14 P.R. 180 (Ont. H.C.), a case where the Master had ordered a change of venue. Chancellor Boyd refused to interfere on appeal because he had not been persuaded that the Master was clearly wrong, even though he said that he himself might have decided the case differently if it had come before him in the first instance.

This was the Ontario standard until the decision of Barlow J. in *Quality Steels (London) Ltd. v. Atlas Steels Limited*, [1949] O.W.N. 110 (H.C.) where he purported to adopt the English standard, quoting the following passage [at pages 111-112] from the speech of Lord Atkin in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 478:

As to the limits of the discretion, if any, it may be necessary to say a word or two later. I only stay to mention a contention of the respondent that the Master having exercised his discretion the judge in Chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights; and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master; but he is in no way bound by it.

In *Marleen Investments Ltd. v. McBride et al.* [1979 CanLII 1895 \(ON SC\)](#), (1979), 23 O.R. (2d) 125 (H.C.), however, Southey J. reinstated the rule as formulated by Chancellor Boyd in *Adamson* and *Odell*, remarking that Barlow J. had overlooked these cases when he decided *Quality Steels*. Southey J. added that different considerations would apply in circumstances where the orders of a master raised questions vital to the final issue of a case. In those instances he concluded that a reviewing judge would be required to exercise an independent discretion, if the Master's decision was questioned on appeal. For this addition to the rule he relied upon the following passage [at pages 127-128] from the speech of Lord Wright in *Evans v. Bartlam*, *supra*, at page 484:

The Masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the judge who will no doubt consider carefully the order of the Master. If a further appeal is taken to the Court of Appeal it is the judge's discretion which that Court has either to support or vary or reverse.

Like the present case, *Marleen Investments* was an appeal from an interlocutory order of a master dismissing an application by the defendants to dismiss an action for want of prosecution (under the appropriate Ontario Rule). Southey J. applied the rule laid down in *Adamson* and *Odell* and having found no error in the Master's decision, dismissed the appeal.



The Ontario rule as restated in *Marleen Investments* was approved and refined by the Ontario Court of Appeal in *Stoicevski v. Casement* [1983 CanLII 1679 \(ON CA\)](#), (1983), 43 O.R. (2d) 436.

In *Stoicevski*, a Local Judge of the Supreme Court, acting as Master, had refused to allow an amendment to a statement of defence in an action arising out of a motor vehicle accident on the ground that the proposed amendment raised matters which would have required the plaintiff to plead a fresh cause of action against third parties. Since the limitation period had expired by the time the amendment was sought, the Local Judge concluded that the plaintiff would be unanswerably prejudiced by the amendment in a manner not compensable in costs. The Divisional Court reversed [(1983), 33 C.P.C. 145]. In allowing the appeal and restoring the order of the Local Judge, Lacourcière J.A., writing for the Court, stated at pages 438 and 439:

One of the arguments presented . . . and adopted by White J. in his dissenting judgment in the Divisional Court, was that the learned local judge arrived at his decision in the exercise of his judicial discretion and consequently his order ought not to have been disturbed by the Divisional Court unless it was *clearly wrong*. I agree that this test (adopted by Southey J. in *Marleen Investments Ltd v. McBride et al.* . . . , following the language of Chancellor Boyd in *Adamson v. Adamson et al.* . . . ) is the appropriate one where an appeal is taken from an interlocutory order involving matters such as a change of venue, a jury notice or a routine amendment to a pleading. However, it was recognized by Southey J., in *Marleen Investments*, *supra*, that some interlocutory rulings which raise questions vital to the final issue of the case require a rehearing in which the judge's discretion may be properly substituted for that of the master or local judge. The present appeal clearly falls within the latter category. An amendment which may have the effect of reducing the plaintiff's quantum of recovery of damages is clearly vital to the final issue. [Emphasis added.]

The following are some examples of decisions of masters in Ontario which have been held to raise questions vital to the final issue of a case: a decision that a limitation period barred the adding of defendants (*Branche v. MacArthur et al.* [1986 CanLII 2750 \(ON SC\)](#), (1986), 56 O.R. (2d) 71 (Div. Ct.)); an order requiring the plaintiff to post security for costs which would have effectively precluded the action from being heard (*Wink (John) Ltd. v. Sico Inc.* [1987 CanLII 4299 \(ON SC\)](#), (1987), 57 O.R. (2d) 705 (H.C.)); a decision to consider a group of plaintiffs collectively rather than individually in determining whether they should post security for costs (*Das v. Coles* [1989 CanLII 4212 \(ON SC\)](#), (1989), 71 O.R. (2d) 57 (H.C.)); and, a refusal to set aside the noting of pleadings closed, the effect of which was that a defendant was deemed to admit the truth of a plaintiff's pleadings (*Hart v. Kowall* [1990 CanLII 6700 \(ON SC\)](#), (1990), 75 O.R. (2d) 306 (Gen. Div.)). In each of these cases, the Motions Judge heard the matter *de novo* and exercised his or her own discretion.

In contrast, motions judges in Ontario have refused to engage in *de novo* review of an order to divide examinations for discovery (*L.C.D.H. Audio Visual Ltd. v. I.S.T.S. Verbatim Ltd. et al.* [1986 CanLII 2758 \(ON SC\)](#), (1986), 54 O.R. (2d) 425 (H.C.)); and an order dismissing a motion to strike out a portion of a claim for punitive damages (*Fazzari et al. v. Pellizzari et al.* [reflex](#), (1988), 28 O.A.C. 38 (Div. Ct.)).

A reading of these cases suggests that the critical question is whether the decision of the

master will preclude a hearing of the case on its merits. If so, it will be considered to raise a question vital to the final issue of the case and *de novo* review is appropriate. But if not, a motions judge will defer to the master's discretion unless, to borrow the language of Chancellor Boyd, he or she is "clearly wrong".

The standard of review in Nova Scotia, when masters were employed there,<sup>6\*fnote6</sup> The office of Master in Nova Scotia was abolished in 1972 by the *Judicature Act*, S.N.S. 1972, c. 2. was similar to the early Ontario Rule. In *King v. Drysdale et al.* (1892), 24 N.S.R. 308 (S.C.), Townshend J. (as he then was) stated at page 317 that the Court's duty on review of a master's discretionary order was "only to see if the master had acted on a wrong principle or had committed some manifest error". Similarly, in *Starratt v. White* (1913), 11 D.L.R. 488 (S.C.), Townshend C.J. stated at page 489 in an appeal from the decision of a master allowing certain interrogatories:

This appeal is of a class which should be discouraged, involving, as it does, only a question whether the County Court Judge, acting as a Master of this Court, properly exercised his decision in a point of practice. All authorities agree that, unless he has erred in principle, the Court will not interfere on appeal.

Twenty-five years after Alberta joined Confederation, the Supreme Court of Alberta developed a different standard of review of discretionary orders made by masters. In *Alta. Wheat Pool v. Nahajowicz* (1930), 24 Alta. L.R. 400 (S.C.A.D.), a case involving an order by a master that the plaintiff deliver particulars of his claim to the defendant, Harvey C.J.A., speaking for the Appellate Division, stated at page 401:

As to the last ground it has been pointed out more than once that the Master is not a Judge but an officer of the Court exercising certain delegated functions and that the rule about discretionary orders by a Judge does not apply to his orders.

This standard of review was applied in *Wright v. Disposal Services Ltd. and Marsh* [1977 CanLII 619 \(AB QB\)](#), (1977), 8 A.R. 394 (S.C.) where Laycraft J. (as he then was) stated at page 398:

It was urged upon me during argument that as the Master had exercised his discretion [the case involved an application to extend the time for serving a statement of claim], I should follow the practice of Appellate Courts and not interfere with that discretion even if I disagreed with the result, unless it was plainly based on wrong principle. In my opinion, however, the rule followed by the Appellate Division in an appeal from a Trial Judge involving an exercise of discretion does not apply to an appeal from the decision of a Master-in-Chambers. While that decision is entitled to the greatest respect, the discretionary jurisdiction possessed by a Superior Court Trial Judge cannot be fettered in any way by the previous decision of the Master. [Emphasis added.]

In reaching that conclusion, Laycraft J. adopted the English standard, as expressed in the speech of Lord Atkin in *Evans v. Bartlam*, *supra*.

In 274099 *Alberta Ltd. v. West Edmonton Mall Shopping Centre Ltd. et al.* (1990), 114 A.R. 57 (C.A.), Côté J.A., writing for the Court, may even have suggested an enlarged standard

when he stated at page 57:

The disposition of any appeal [from the decision of a Master] depends upon the correctness of the formal judgment appealed from, not the correctness of the reasons for judgment. Furthermore, in Alberta an appeal from a Master to a judge is *de novo*. The judge exercises any discretion anew. New evidence may be put before him for that reason, and because he has original jurisdiction as well. He is not just an appellate tribunal.

After considering both positions, MacDonald J. of the Supreme Court of British Columbia adopted the Ontario standard as laid down in *Stoicevski*, in *Abermin Corp. v. Granges Explor. Ltd.* [1990 CanLII 1352 \(BC SC\)](#), (1990), 45 B.C.L.R. (2d) 188. *Abermin* was an appeal from the order of a master granting a motion to adjourn applications to fix security for costs. The Master had granted the order on condition that examinations for discovery then scheduled should not proceed until the disposition of the applications.

Confronted by seemingly conflicting decisions in the Supreme Court of British Columbia as to the appropriate standard, MacDonald J. looked for guidance in "other provincial jurisdictions which have been operating under the same constitutional limitations for some years" (page 192). He considered the Alberta standard as expressed in *Wright v. Disposal Services Ltd.*, *supra*, and the Ontario standard as expressed both in *Marleen Investments Ltd.*, and *Stoicevski*, *supra*, and concluded at page 193:

The decision in *Stoicevski v. Casement* represents a realistic compromise between the various policy considerations which bear upon the scope of review which should be permitted. . . . An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master.

Since both Alberta and Ontario now seem to have adopted the positions taken by different Law Lords in *Evans v. Bartlam*, it might be useful to review the facts in that case briefly.

*Evans v. Bartlam* was a case where a Master refused to set aside a judgment which had been noted in default for failure to file an appearance. It was apparent that the defendant had a defence to the claim (see the speech of Lord Wright at page 489), but by refusing him leave to reopen, the Master was effectively precluding him from ever raising it. The Motions Judge, exercising his own discretion, reversed the Master's decision. A majority of the Court of Appeal reversed the decision of the Motions Judge. Before the House of Lords, the issue was the correctness of the decision of the Court of Appeal, but in delivering their speeches, Lords Atkin and Wright made the observations concerning the review of discretionary orders of masters already quoted. The House of Lords held that the Motions Judge was not in error in substituting his discretion for that of the Master, thus affording the defendant an opportunity to file a defence and allowing the substantive rights of both parties to be determined at a trial in the ordinary way.

In the province of Quebec, the [Code of Civil Procedure of Quebec](#) [R.S.Q. c. C-25] provides several avenues of review of orders made by prothonotaries. See Audet, *Les officiers de justice: des origines de la colonie jusqu'à nos jours* (Montréal: Wilson & Lafleur, 1986), at pages 199-204. Some orders are reviewable by a hearing *de novo* in a proceeding before a Superior Court Judge known as *revision*. See, for example, [Code of Civil Procedure of Quebec](#), [Articles 42](#) and [44.1](#), and *Lacaud c. Leblanc*, [1983] C.S. 555 (Que. S.C.). Others are reviewable in appeals to the Court of Appeal, in which case they are treated like final judgments of the Superior Court. See *Code of Civil Procedure of Quebec*, [Articles 41](#) and [511](#), and Audet, at page 202. Others, still, are reviewable in special proceedings for retraction and annulment. See Audet, at pages 201-204.<sup>7</sup>\*ftnote<sup>7</sup> In Quebec, the office of *protonotaire* was established by *An act for the division of the Province of Lower-Canada, for amending the Judicature thereof, and for repealing certain Laws therein mentioned* [34 Geo. III, c. 6] 1793. The current authority for the office is the *Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 4. For a discussion of the origins and functions of the office, see Audet, pp. 53-60. It is worth noting that in Quebec, unlike in this Court, there is no statutory requirement that a prothonotary be a member of the legal profession. Indeed, even today, a majority of the prothonotaries in Quebec do not hold law degrees (see Audet, p. 175). As Professor Audet notes, for the majority of those who hold appointments as prothonotaries, prothonotarial duties only comprise a portion of their workload. A great deal of their time is spent carrying out clerical functions (see pp. 175-176). In short, the modern office of prothonotary in Quebec is quite unlike that of the prothonotary of this Court.

Although in *Abermin*, MacDonald J. considered the seemingly conflicting lines of authority as reflecting different policy considerations, it is my view that a more plausible explanation of the difference between the Ontario and Alberta standards may be that they are based upon different constitutional approaches to the office of Master. In Ontario, the approach was expressed by Middleton J.A. in *Re Solloway Mills & Co.*, [1934 CanLII 157 \(ON CA\)](#), [1935] O.R. 37 (C.A.) at page 43 as follows:

The contention that the Province has no power to appoint Masters or to authorize an enquiry before any of the Court's officers, because they are executing a judicial and not a ministerial power, is plausible but ill founded. [Section 96](#) of The [British North America Act, 1867, 30-31 Vict., ch. 3](#), requires the appointment of Judges of the Superior and County Courts by the Governor General of Canada, but this does not prohibit the Province from appointing an officer of the Court who may exercise some judicial functions.

In contrast, in *Wright v. Disposal Services Ltd. and Marsh*, *supra*, at page 398, Laycraft J. justified *de novo* review on the basis that:

The Superior Court Judge possesses that jurisdiction by virtue of his Federal appointment under the powers given the Federal Crown by the *British North American Act* [sic]. His status resulting from that appointment cannot be diminished by the decision of the Master appointed by the Provincial Crown.

Even if I am correct in my assessment of the reasons for the differing approaches, it is not necessary in this appeal to decide which of these constitutional positions is correct, since the constitutional infirmity to which the Alberta master's appointment is said to be subject does not extend to the appointment of a prothonotary to this Court. That Parliament has

constitutional authority by virtue of [section 101](#) of the [Constitution Act, 1867](#) [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the [Constitution Act, 1982](#), Item 1) [R.S.C., 1985, Appendix II, No. 5]] to appoint both prothonotaries and judges of this Court cannot be doubted. That was the conclusion of Jerome A.C.J. in *Iscar Ltd. v. Karl Hertel GmbH*, [reflex](#), [1989] 3 F.C. 479 (T.D.) It is a conclusion with which I am, respectfully, in complete agreement. I am also in agreement with the Associate Chief Justice where he said at page 484:

It is clear from paragraph 46(1)(h) of the [\[Federal Court\] Act](#) that Parliament did not intend prothonotaries to act simply as procedural officers of the Court. On the contrary, it is clear from that section that Parliament intended prothonotaries to have jurisdiction of a judicial nature.

What, then, should the standard of review of discretionary orders of prothonotaries of this Court be? It is of paramount importance that any standard adopted must recognize Parliament's intention, embodied in [section 12](#) of the [Act](#), that the office of prothonotary is designed to aid in "the efficient performance of the work of the Court". Sir Jack Jacob captured the essence of this intent in the following passage of his *Hamlyn Lectures*:<sup>8\*fnote8</sup> *Op. cit.*, at p. 112.

They fulfil many important and even crucial functions in the English judicial system. They provide a more speedy, economical and convenient machinery for pre-trial and post-judgment applications; they perform the greater volume and variety of the judicial work at the stages of pre-trial and post-judgment proceedings which would otherwise require to be performed by a Judge, so conserving "judge-power" for more important work and making more efficient use of "judge-time"; . . .

I reiterate at the outset that Rule 336(5), by providing for a right of appeal from all orders made by prothonotaries, was intended to satisfy the requirement for supervision of those orders as required by [paragraph 46\(1\)\(h\)](#) of the [Act](#).

A question was raised in argument as to whether the order of the Associate Senior Prothonotary was interlocutory or final. In my view, this question does not assist us in determining the standard of review. Rule 336(1)(g) vests in the prothonotary authority to "dispose of any interlocutory [application](#) assigned to him specially . . . by special or general direction of the Chief Justice or of the Associate Chief Justice" [Emphasis added.] Once it is determined that the prothonotary was acting within jurisdiction, then, the question then becomes by what standard his decision is to be reviewed.

In this case, there is no question that the application as a result of which the order was made was interlocutory. It was accordingly an application which the Associate Senior Prothonotary had jurisdiction to hear by virtue of Rule 336(1)(g) and the general direction of the Associate Chief Justice to which I have already referred. The question remaining to be answered, then, is what is the appropriate standard of review of the discretionary order which the Associate Senior Prothonotary made in disposing of that application.

Until the decision of this Court in *Jala Godavari*, it had been held consistently and accepted as settled law in the Trial Division of this Court that an appeal from a discretionary order of a



prothonotary should be treated in the same manner as an appeal from a discretionary order of a motions judge, reviewable for error rather than as a re-hearing on the merits.

In *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 22 C.I.P.R. 240 (F.C.T.D.) at page 244, McNair J. described the approach as follows:

Rule 336(5) of the Federal Court Rules provides for appeals from an order or decision of a prothonotary, and it is unnecessary to set it out verbatim. Suffice it to say, the Rule has been the subject of some judicial consideration.

In my view, the law was correctly stated by Mr. Justice Collier in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1987), 12 C.I.P.R. 260, at pp. 261-262 as follows:

[a]n appeal from the decision of a Prothonotary is not a trial de novo.

It is not the function of the Trial Division, sitting on appeal from Prothonotaries, to substitute its discretion for that of the Prothonotary. It must be shown the Prothonotary was wrong, in that he exercised his powers on a wrong principle, or on a complete misapprehension of the facts, or for some other compelling reason requiring interference by a Judge sitting in an appellate position.

Ample support for this principle may be found in the case of *Algonquin Mercantile Corp. v. Dart Industries Can. Ltd.* (1984), 5 C.I.P.R. 40 (Fed.C.A.), wherein the Court held that the order under appeal, being discretionary, should be overruled only if the motions Judge was clearly wrong on the facts, or proceeded on an erroneous principle of law, or his decision resulted in some injustice to the appellant. None of these circumstances were existent in the case on appeal. It seems to me that it is now authoritatively settled as a rule of practice that an appeal from a discretionary order, whether it be that of a prothonotary or a motions Judge, should be treated as an appeal rather than a rehearing on the merits, and the order appealed from should be interfered with only when it can be demonstrated that such order was clearly wrong in law or on the facts.<sup>9</sup>\*fnote<sup>9</sup> See also, *Johnson Products Co. v. Truso Ltd.* (1987), 12 C.I.P.R. 22 (F.C.T.D.), per Jerome A.C.J.; *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1987), 12 C.I.P.R. 260 (F.C.T.D.), per Collier J.; *Westinghouse Electric Corp. et al. v. Babcock & Wilcox Industries Ltd. (trading under name and style Bailey Controls et al.)* [reflex](#), (1987), 15 C.P.R. (3d) 447 (F.C.T.D.), per Strayer J.; *Standal Estate v. Swecan International Ltd.* (1989), 24 C.I.P.R. 298 (F.C.T.D.), per McNair J.; *Syntex Inc. v. Novopharm Ltd.* (1989), 24 C.I.P.R. 144 (F.C.T.D.), per MacKay J.; *Unilever PLC v. Proctor & Gamble Inc.* (1989), 23 C.I.P.R. 237 (F.C.T.D.), per Reed J.; *David et al. v. Kluger et al.* [reflex](#), (1991), 51 F.T.R. 234 (F.C.T.D.), per Martin J.; *Iscar Ltd. v. Karl Hertel GmbH*, [reflex](#), [1989] 3 F.C. 479 (T.D.), per Jerome A.C.J.; and the cases referred to by Hugessen J.A. in *Jala Godavari*, at page 128. [Emphasis added.]

In *Jala Godavari*, however, Hugessen J.A., writing for the Court, laid down a different standard at page 128:

. . . contrary to a view that has sometimes been expressed in the Trial Division, a judge who hears an appeal from a prothonotary on a matter involving the exercise of discretion is called

upon to exercise his own discretion and is not bound by the prothonotary's opinion. He may, of course, choose to give weight to the views expressed by the prothonotary, but the parties are, in the final analysis, entitled to the discretion of a *judge* and not that of a subordinate officer.

The standard of review laid down in *Jala Godavari* was followed in *Prouvost S.A. v. Munsingwear Inc.*, [reflex](#), [1992] 2 F.C. 541 (C.A.); *Canastrand Industries Ltd. v. Lara S (The)*, [reflex](#), [1992] 3 F.C. 398 (T.D.) and *Ruhrkohle Handel Inter GMBH v. Federal Calumet (The)*, [reflex](#), [1992] 3 F.C. 98 (C.A.).

Before us, counsel for the appellant contended, both in written and oral submissions, that the Motions Judge had applied a standard of review that was inappropriate to the circumstances of this case. He argued this way: the order which the Associate Senior Prothonotary made in this case was an interlocutory order made upon an interlocutory application; that order did not decide any question vital to the final issue in the case, and, as such it was reviewable only for error; the Motions Judge was therefore wrong in applying the standard enunciated in *Jala Godavari* and exercising his own discretion. In this connection, counsel for the appellant urged upon us that the proper standard of review of discretionary orders of prothonotaries was that which was laid down in *Stoicevski, supra*, and adopted in *Abermin Corp. v. Granges Explor. Ltd., supra*.

Counsel for the respondent submitted in paragraph 15 of his supplementary memorandum of fact and law that such a standard may well be desirable "as a means of balancing the competing interests of judicial due process in vital matters and administrative expedition in routine matters." He contended, however, that in this case, the Motions Judge had applied the proper standard. First, he said, "The Motions Judge explicitly invoked the hearing *de novo* standard enunciated by Hugessen J.A. (in *Jala Godavari*) and applied it." [Respondent's supplementary memorandum of fact and law, paragraph 11.] Secondly, he said, that "the Motions Judge also implicitly applied the appellate review standard when he concluded that the Associate Senior Prothonotary erred in principle in finding that the Respondent's tardiness in moving for dismissal of the action had excused the Appellant's failure to prosecute the action." [Respondent's supplementary memorandum of fact and law, paragraph 12.] Counsel also contended that the *de novo* standard "is the proper standard to apply in cases such as the present, where the motion is vital to the ultimate outcome of the claim." [Respondent's supplementary memorandum of fact and law, paragraph 13.]

I am in agreement with counsel for the appellant that the proper standard of review of discretionary orders of prothonotaries in this Court should be the same as that which was laid down in *Stoicevski* for masters in Ontario. I am of the opinion that such orders ought to be disturbed on appeal only where it has been made to appear that

- (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
- (b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

In each of these classes of cases, the Motions Judge will not be bound by the opinion of the prothonotary; but will hear the matter *de novo* and exercise his or her own discretion.

As counsel for the respondent himself has submitted, in paragraph 15 of his supplementary memorandum of fact and law, this standard balances judicial due process on questions vital to the final issue of a case with administrative expedition in routine matters. Moreover, such a standard is consistent with the parliamentary intention embodied in [section 12](#) of the [Act](#), that the office of prothonotary is intended to promote "the efficient performance of the work of the Court".

In my respectful view it cannot reasonably be said that a standard of review which subjects all impugned decisions of prothonotaries to hearings *de novo* regardless of the issues involved in the decision or whether they decide the substantive rights of the parties is consistent with the statutory objective. Such a standard conserves neither "judge power" nor "judge time". In every case, it would oblige the motions judge to re-hear the matter. Furthermore, it would reduce the office of a prothonotary to that of a preliminary "rest stop" along the procedural route to a motions judge. I do not think that Parliament could have intended this result.

On this analysis, it is my view that the standard of review laid down in *Jala Godavari* is incomplete. It follows from this that the Motions Judge did not apply the proper standard of review to the discretionary order of the Associate Senior Prothonotary in this case.

Although on the basis of the Canadian and English authorities set out above, it is in my view clear that the authority of the prothonotaries of this Court should not be limited in any way suggested in *Jala Godavari*, there is a decision on point from the Supreme Court of New South Wales which I feel to also be of some interest. *Do Carmo v. Ford Excavations Pty Ltd*, [1981] 1 N.S.W.L.R. 409 (S.C.),<sup>10\*</sup><sup>10</sup> Affd [1981] 1 N.S.W.L.R. 409 (S.C.), over in part [1981] 2 N.S.W.L.R. 253 (C.A.) (var'd (1984), 58 A.L.J.R. 287 (Aust. H.C.)) involved the very same question at issue here, *viz.* the way in which the decision of a master ought to be regarded on appeal. After a very thorough review of the law, Cross J. concluded that in New South Wales, unlike in England or certain other Australian states, a master was the Court, rather than merely an officer of the Court, and his decisions were therefore to be treated as judicial decisions of first instance. While this is not as clearly the case with this Court,<sup>11\*</sup><sup>11</sup> I say this because of the wording of the [Federal Court Act](#) and Rules. The [Federal Court Rules](#), for example, speak of appeals from the Prothonotaries to the Court. Having said this, though, there is some room for argument on the point. In *Iscar Ltd. v. Karl Hertel GmbH*, it will be remembered, when Associate Chief Justice Jerome held that Prothonotaries do have jurisdiction to strike out pleadings, he was interpreting [Rule 419\(1\)](#) which provides that: "The Court may at any stage of an action order any pleading . . . to be struck out". I think that Cross J.'s observations at page 420 about the value of masters in the efficient operation of the judicial process bear repeating in the present situation:

[P]art of the scheme of the [*Supreme Court*] Act and rules was to set up a body of judicial officers who were, or who would quickly become, expert in the practice and procedure of the court and who, could readily and expertly decide practice and procedural problems. Providing they exercised their discretion judicially "as normally they would" that was to be the end of the matter.

2. Whether the Motions Judge erred in allowing the respondent's appeal and setting aside the order of the Associate Senior Prothonotary.



If the Motions Judge had applied the appropriate standard of review, he would have inquired whether the order of the Associate Senior Prothonotary was clearly wrong in the sense that I have indicated, or whether it involved the improper exercise of discretion on a question vital to the final issue of the case. As I have already explained, the Motions Judge did neither. He relied instead on the incomplete standard laid down in *Jala Godavari* and exercised his own discretion without first determining whether he could properly do so.

In these circumstances, it becomes necessary to review the reasons of the Associate Senior Prothonotary in light of the standard I have proposed as appropriate to determine whether the Motions Judge was justified in reversing the order on appeal before him.

I begin with the first branch of the standard, i.e. whether the order of the Associate Senior Prothonotary was clearly wrong. I note that there was no allegation here that the Associate Senior Prothonotary misapprehended the facts. I will therefore say no more about it.

The error alleged by the respondent and accepted by the Motions Judge was that the Associate Senior Prothonotary based his decision on a wrong principle when he took into account the conduct of the respondent in the litigation. It is useful to recall here the dispositive reasons of the Associate Senior Prothonotary. After he had detailed the conduct of both solicitors throughout the litigation, he noted [at page 5547]:

Having apparently excused a one year delay prior to March 1988, and a further two year delay prior to May 1990, or if it did not excuse those delays to have done nothing about either of them until June of 1991. [sic] The defendant cannot be heard to complain at this late date of the plaintiff's failure to proceed expeditiously at earlier times nor of the plaintiff's failure to react to the defendant's delays in commenting on the Agreed Statement of Facts.

Indeed, it was largely because he had taken this conduct into account that the Motions Judge found him to have been in error. In my view, in taking such conduct into account, the Associate Senior Prothonotary was acting in accordance with well-settled principles which have been accepted by this Court. See *Norton Co. v. Lionite Abrasives Ltd.* (1975), 32 C.P.R. (2d) 270 (F.C.T.D.); *Minnesota Mining and Manufacturing Company v. Lorcon Inc.*, [1984] 1 F.C. 380 (T.D.); and *McGregor and McGregor v. Canada* [reflex](#), (1988), 20 F.T.R. 122 (F.C.T.D.).

It is true, as the Ontario Court of Appeal held in *Farrar v. McMullen*, [1970 CanLII 555 \(ON CA\)](#), [1971] 1 O.R. 709 (and as was referred to by the Motions Judge), that a demand for action by the defendant is not a condition precedent to an application for dismissal on the basis of want of prosecution in every case, but in my view, there can be no doubt that the level of litigious activity or inactivity on the part of the defendant is a relevant factor to be taken into account in determining whether a delay has been inordinate or inexcusable, and whether a party has been seriously prejudiced by it. It is, as *Farrar* suggests, one of the circumstances to be considered.<sup>12\*fnote12</sup> It is also worthwhile to note that notwithstanding the reliance which the Motions Judge placed upon the *dicta* of Gale C.J.O. in *Farrar*, the Ontario Court of Appeal declined to dismiss the action despite the death during the delay of the only witness who could testify on behalf of the defendant. In arriving at his conclusion, the Associate Senior Prothonotary did no more.

The English courts, too, have considered the conduct of the parties to be relevant in similar circumstances. In *Allen v. McAlpine (Sir Alfred) & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), for example (upon which counsel for the respondent placed much reliance), each member of the Court of Appeal considered the defendant's conduct to be of importance. Diplock L.J. (as he then was) made this point quite clearly when he said at page 556:

Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. Moreover, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay.<sup>13\*fnote13</sup> For similar views, see the judgments of Lord Denning M.R. at p. 550 and Salmon L.J. (as he then was) at pp. 563-564.

In light of the principles laid down in these cases, I am of the view that the Associate Senior Prothonotary did not act on a wrong principle and that his order was not clearly wrong.

I turn now to the second branch of the standard, namely, whether the order of the Associate Senior Prothonotary raised questions vital to the final issue of the case.

It was the contention of counsel for the respondent in paragraph 13 of his supplementary memorandum of fact and law that the motion before the Associate Senior Prothonotary was "vital to the outcome of the claim." For that reason, he submitted that the Motions Judge was justified in refusing deference of the discretion of the Associate Senior Prothonotary and exercising his own. This contention is not well-founded, in my opinion. The order which the Associate Senior Prothonotary made was interlocutory.<sup>14\*fnote14</sup> For a definition of interlocutory order, see *Hendrickson v. Kallio*, [1932 CanLII 123 \(ON CA\)](#), [1932] O.R. 675 (C.A.), where Middleton J.A. said at p. 678:

[An interlocutory order] is an order which does not determine the real matter in dispute between the parties"the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined. [Emphasis added.]

Similarly, in *Bozson v. Altrincham Urban Council*, [1903] 1 K.B. 547 (C.A.) at pp. 548-549, Lord Alverstone C.J. said:

It seems to me that the real test for determining this question [*i.e.*, whether an order is interlocutory] ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order. it did not decide the substantive rights of the parties or any issue vital to the final issue of the litigation. Its sole effect was that the appellant was entitled to proceed to trial in accordance with the rules and practice of this Court. As such, it decided a matter that was wholly collateral to the issues in dispute between the parties in the litigation. As the pleadings clearly show, delay in prosecution was not an issue in dispute in the action. In my view, therefore, it cannot reasonably be said that the order

made by the Associate Senior Prothonotary raised questions vital to the final issue of the case.

The test to be applied in deciding whether to dismiss an action for want of prosecution was set out in the decision of Dubé J. in *Nichols v. Canada et al.*, [reflex](#), (1990), 36 F.T.R. 77 (F.C.T.D.). Relying upon the judgment of Salmon L.J. (as he then was) in *Allen v. McAlpine (Sir Alfred) & Sons, Ltd.*, *supra*, at page 561, Dubé J. stated at page 78:

The classic test to be applied in these matters is threefold: first, whether there has been an inordinate delay; secondly, is the delay inexcusable; and thirdly, whether the defendants are likely to be seriously prejudiced by the delay.

In *Birkett v. James*, [1978] A.C. 297 (H.L.), the House of Lords affirmed the principles set out in *Allen* and expounded upon the grounds for dismissal for want of prosecution. Lord Diplock (who, as I have noted, delivered one of the judgments in *Allen*) said that *Allen* had set out the following principles. The power to strike out a claim for want of prosecution, he said (at page 318).

... should be exercised only where the Court is satisfied either (1) that the default had been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff and or lawyers, and (b) that such a delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

More recently, in *Department of Transport v. Chris (Smaller) Transport Ltd.*, [1989] A.C. 1197 (H.L.), Lord Griffiths, in a speech in which all other members of the House concurred, reaffirmed the same point. At pages 1207-1208, he said:

The principles in *Allen v. McAlpine* and *Birkett v. James* are now well understood and I have not been persuaded that a case has been made out to abandon the need to show that the post writ delay will either make a fair trial impossible or prejudice the defendant.

See also: *Walkley v. Precision Forgings Ltd.*, [1979] 2 All E.R. 548 (H.L.); *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn. Ltd.*, [1981] A.C. 909 (H.L.) and, *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] A.C. 854 (H.L.).

A review of the decision of the Associate Senior Prothonotary makes it abundantly clear that he considered each element of this test in reaching his conclusion, albeit in different language. Accordingly, for all of these reasons, it is my view that the Motions Judge erred in allowing the respondent's appeal and setting aside the order of the Associate Senior Prothonotary.

In *Birkett v. James*, their Lordships also made an important observation on the consequences of an order to dismiss for want of prosecution, which I think is critical to a proper understanding of the nature of an order to dismiss a proceeding for want of prosecution. In most circumstances, the House noted, such an order is not a bar to further action. "[E]xceptional cases apart" (chief of which would include the expiry of a limitation period), Lord Diplock said at page 321

... where all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution.

Similarly, Lord Salmon, who had also delivered one of the judgments in *Allen*, said that "[t]he fact that the plaintiff or his solicitor has behaved badly in the first action does not make him into a vexatious litigant barred from bringing any further proceedings without permission of the courts" (page 328). See also the speech of Lord Edmund-Davies at page 334.

These things being the case, Lord Diplock made an important observation which I think should be borne in mind whenever a motion to dismiss is being contemplated [at page 320]:

Crucial to the question whether an action ought to be dismissed for want of prosecution before the expiry of the limitation period is the answer to a question that lies beyond it, viz., whether a plaintiff whose action has been dismissed may issue a fresh writ for the same cause of action. If he does so within the limitation period, the effect of dismissing the previous action can only be to prolong the time which must elapse before the trial can take place beyond the date when it could have been held if the previous action had remained on foot. Upon issuing the new writ the plaintiff would have the benefit of additional time for repeating such procedural steps as he had already completed before the action was dismissed. This can only aggravate; it can never mitigate the prejudice to the defendant from delay. [Emphasis added.]

In *Department of Transport v. Chris (Smaller) Transport Ltd.*, *supra*, Lord Griffiths, speaking for the House, made a similar observation on the appropriateness of an order to dismiss after the expiry of a limitation period. At page 1207, he said:

However, [counsel for the Appellants] submits that once the limitation period has expired so that the plaintiff cannot commence a fresh action, inordinate and inexcusable delay in the conduct of the litigation should be a ground for striking out even though there can be a fair trial of the issues and the defendant has suffered no prejudice from the delay. What would be the purpose of striking out in such circumstances? If there can be a fair trial and the defendant has suffered no prejudice, it clearly cannot be to do justice between the parties before the court; as between the plaintiff and defendant such an order is manifestly an injustice to the plaintiff. The only possible purpose of such an order would be as a disciplinary measure which by punishing the plaintiff will have a beneficent effect upon the administration of justice by deterring others from similar delays. I have no faith that the exercise of the power in these circumstances would produce any greater impact on delay in litigation than the present principles.

Given the absence of a showing of prejudice by the respondent here, I find the sentiments there expressed appropriate in the circumstances of this case.

Before parting with the matter, there is one other important aspect of this case which I should like to mention. It is clear to me from a review of the record in this appeal that counsel had agreed to by-pass the *Federal Court Rules*, by proceeding by agreed statement of facts and waiving certain procedural steps, such as delivery of lists of documents and examinations for discovery. In my view this agreement was a relevant circumstance to consider in assessing the

conduct of the solicitors for both parties. There is no evidence that the respondent had repudiated the agreement. The reasons of the Motions Judge are devoid of any hint that he was alive to this contextual fact; and it may well be that, absent repudiation or some other warning, the appellants' solicitor was induced to act on the assumption that respondent intended to continue the litigation.

There is no doubt, as the Associate Senior Prothonotary found and as the record discloses, that the appellant's solicitor was dilatory in delivering the agreed statement of facts. However, when it was delivered, respondent's counsel deliberately refused to react for well over one year. When he did react, it was by notice of motion under Rule 440(1), but without even complying with the provisions of Rule 440(2) which require that prior warning be given before a motion under Rule 440(1) is launched. Fortunately for the respondent, in argument before us appellant's counsel informed us that he was not invoking non-compliance with Rule 440(2) as a ground of error since it was his position throughout that counsel for the parties had agreed to by-pass the Rules.

I would, therefore, allow the appeal with costs, both here and below, set aside the order of the Motions Judge dated November 8, 1991 and restore the order of the Associate Senior Prothonotary dated September 30, 1991.

\* \* \*

*The following are the reasons for judgment rendered in English by*

MacGuigan J.A.: I have had the opportunity of reading the reasons for judgment of the Chief Justice and accept his statement of the facts except for his assumption that there was an agreement between the parties in 1988 as to the preparation of a draft statement of facts by the appellant. As I read the materials, the only agreement on the part of the respondent was that it would "review" such a draft, if prepared (Appeal Book at page 33).

I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicovski v. Casement* [1983 CanLII 1679 \(ON CA\)](#), (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

(b) they raise questions vital to the final issue of the case.<sup>15\*</sup><sup>15</sup> It should be noted that Lord Wright's phrase "the final issue of the case" is quite different from "the final issue in the case." Lord Wright means "vital to the result of the case" rather than "vital to the ultimate issue on the merits of the case."

As to which judge to follow in *Evans v. Bartlam*, it is true that what Lord Atkin said in at p. 478 could imply that in every case a judge must exercise his own discretion: "His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it." But even if

these words are to be given their full extension, in contradistinction to the opinion of Lord Wright, it would be by no means clear that he carried a majority of the House with him on the point. Only Lord Thankerton concurred with him. Lord Russell of Killowen did not deal directly with the matter, and Lord Roche, appearing to recognize no distinctions in the views expressed, concurred with everyone. In any event, what the appellant needed to establish was the opposite point of view to that she contended Lord Atkin held, viz., that the master's discretion should always govern, but in fact she endorsed a modified version of Lord Wright's rule, and was unable to sustain it.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

In *Canada v. "Jala Godavari" (The)* [reflex](#), (1991), 40 C.P.R. (3d) 127 (F.C.A.), this Court in an *obiter dictum* stated the rule the other way around, seeking to emphasize the necessity for the exercise of the Judge's discretion *de novo*, in contradistinction to the view that was at that time gaining acceptance in the Trial Division that the prothonotary's discretion should be followed unless he had committed error of law. *Jala Godavari* should not, I think, be read as meaning that the prothonotary's discretion should never be respected, but rather that it is subject to an overriding discretion by a judge where the question involved is vital to the final issue of the case. (Error of law is, of course, always a reason for intervention by a judge, and is not in any way in controversy).

Now, in the case at bar, what kind of interlocutory order was in question? The appellant urged this Court to follow *Stoicevski*, but was unable to explain in argument why the prothonotary's decision here was not on a question vital to the final issue of the case. The formulations both of Lord Wright and Lacourcière J.A. underline the contrast between "*routine matters of pleading*" (Lord Wright) and "*a routine amendment to a pleading*" (Lacourcière J.A.) [*italics added*] and questions vital to the final issue of the case, i.e., to its final resolution.

The question before the prothonotary in the case at bar can be considered interlocutory only because the prothonotary decided it in favour of the appellant. If he had decided it for the respondent, it would itself have been a final decision of the case: *A-G of Canada v. S.F. Enterprises Inc. et al.* (1990), 90 DTC 6195 (F.C.A.) at pages 6197-6198; *Ainsworth v. Bickersteth et al.*, [1947 CanLII 122 \(ON CA\)](#), [1947] O.R. 525 (C.A.). It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

I believe this approach is supported by the Ontario Court of Appeal in *Stoicevski*, where



Lacourcière J.A. held (at page 439) that "[a]n amendment [to a statement of defence] which may have the effect of reducing the plaintiff's quantum of recovery of damages is clearly vital to the final issue." More important, the decision by the English Court of Appeal on the third appeal in *Allen v. McAlpine (Sir Alfred) & Sons, Ltd.*, [1968] 1 All E.R. 543, where the Court refused to intervene against a motions judge's substitution of his discretion for that of a master on a motion to dismiss an action for want of prosecution, is on all fours with the case at bar. It is true that on the facts in the third appeal in *Allen*, the delay had been one for 14 years, but that fact can have nothing to do with the issue of whose discretion is to govern.

I am therefore drawn to the conclusion that the learned Motions Judge was entirely right in following *Jala Godavari* and exercising his own discretion *de novo*.

In my view, as the respondent contended, the Motions Judge's reasons for decision could also be construed as being implicitly based on the prothonotary's error in coming to his conclusion [at page 5643] "solely on the grounds that the defendants had not complained of the plaintiff's tardiness or taken some action at an earlier date," in the words of the Motions Judge himself. In other words, the prothonotary had fallen into an error of law which prevented him from exercising his discretion properly. This would also justify the Motions Judge's exercise of discretion *de novo*. The prothonotary's fundamental error was in assuming that the respondent was under an obligation to take action in response to the draft statement of facts. As Diplock L.J. (as he then was) put it in *Allen* (at page 555):

It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

The second issue is whether the Motions Judge has properly exercised his discretion. In so exercising his discretion, he took account of the prothonotary's finding [at page 5547] that the appellant's action "might well have supported a successful motion to dismiss," and also of the question whether the subsequent delay by the respondent was sufficient to excuse the appellant's failure to prosecute in a reasonable and timely manner. Weighing both factors he arrived at the finding [at page 5643] that "the delay on the plaintiff's part has been of such substantial proportion as to likely cause prejudice to the defendant at trial."

Of course, as Diplock L.J. also said in *Allen* (at page 556):

Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant his previous conduct in the action is always relevant.

However, that the Motions Judge did not fail to take this factor into account is established to my mind by the following passage from his reasons [at pages 5642-5643]:

The fact that plaintiff's delay in prosecuting this case is sufficient to warrant an order dismissing the action is not, under the circumstances, altered by any subsequent delay on the part of the defendant. The implication that the defendant's lack of action excused the plaintiff's

failure to prosecute in a reasonable and timely manner is simply not correct. [Emphasis added.]

It was also said that the Motions Judge should have explicitly taken into consideration an admission made by the respondent, but that "admission" is only as to the fact that "there was substantial evidence from the witness at the trial in the Tax Court," [at page 5546] a fact presumably already in the record. While relevant, that does not get the appellant even to first base in refuting the overall effect of the prejudice to the respondent's case caused by the cumulative delays.

The Motions Judge having exercised his discretion, this Court cannot intervene in the absence of an error of law. As it was put by Mahoney J.A. for this Court in *The Queen v. Murphy and ABC Steel Building Ltd.* (1988), 89 DTC 5028 (F.C.A.), at page 5029:<sup>16\*</sup><sup>16</sup> The slightly more complete formulation of Urie J.A. in *Canadian National Railway Co. v. The Norango*, [1976] 2 F.C. 264 (C.A.) at p. 268 is as follows:

The normal rule is that an appellate court ought not to interfere with the discretion of a trial judge acting within his jurisdiction unless it is clearly satisfied that the discretion has been wrongly exercised either because the judge had acted on some wrong principle of law or because on other grounds the decision would result in some injustice being done.

There was no argument in the case at bar as to other grounds on which injustice might have been done.

The order of the Trial Division is discretionary. The principles to be applied by this Court have been accepted as those stated by Lord Diplock in *Birkett v. Jones* [sic] [1978] A.C. 297] at page 317:

. . . an appellate court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either . . . where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account;

The appellant contended that the respondent had condoned, acquiesced in or waived its right to object to any unreasonable delay on her part. But this argument was rested on her view that the draft statement of facts was prepared on the basis of an agreement between the parties. As I have said, the only agreement seems to have been to the effect that the respondent would "review" such a draft, if prepared. In any event, this is a factual determination which was open to the Motions Judge, who clearly did not find the respondent's lack of response to amount to condonation, acquiescence or waiver.

A motions judge must not fall into error of law in considering how serious is the prejudice caused by the delay. But the Motions Judge in the case at bar raised the question properly [at page 5642]: "the defendant must show . . . that it will likely be seriously prejudiced by the delay." He also answered it squarely [at page 5643]: "It is clear on the facts that the delay on



the plaintiff's part has been of such substantial proportion as to likely cause prejudice to the defendant at trial." [Emphasis added.] Given the Motions Judge's reliance on his assessment of the facts, I find myself unable to conclude that he relied solely on an intuitive notion that inordinate delay necessarily entails serious prejudice, and I therefore find no manifest error of law such as would permit me to interfere with his exercise of discretion.

The appellant also argued that the respondent was in violation of former Rule 447(2), which required it "within 20 days after the pleadings in the action are deemed to be closed as between him and any other party, or such longer period as that other party may agree to, file and serve on that other party a list of the documents of which he has knowledge at that time that might be used in evidence . . . ." However, the only sanction for any such *pro forma* requirement is a Court order to produce under Rule 460, [as am. by SOR/90-846 , s. 15] a procedure which has not been invoked by the appellant. Similarly, the respondent relied on the provisions of Rule 331A [enacted by SOR/79-57 , s. 6], that "[w]here a year, or more, has elapsed since the last proceeding in a matter, a party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed." But there seems to be no consequence clearly provided in the rules for such default, and in any event the rule was not previously invoked.

The appellant not having succeeded in establishing any error of law, the appeal must therefore be dismissed with costs.

Mahoney J.A.: I agree.

Décary J.A.: I agree.

\* \* \*

*The following are the reasons for judgment rendered in English by*

Robertson J.A. (*dissenting*): I share the view of the Chief Justice that this appeal should be allowed. Even if I were to accede to the argument of my colleague MacGuigan J.A. that under the proposed review standard the Trial Judge was entitled to exercise his discretion *de novo*, I am not persuaded that the result should be any different. In my respectful opinion, the Motions Judge erred when applying the test on which decisions to dismiss actions for want of prosecution must be based. That test is set out in the decision of Dubé J. in *Nichols v. Canada et al.* [reflex](#), (1990), 36 F.T.R. 77 (F.C.T.D.), at page 78:

The classic test to be applied in these matters is threefold: first, whether there has been an inordinate delay; secondly, is the delay inexcusable; and thirdly, whether the defendants are likely to be seriously prejudiced by the delay. [Emphasis is mine].

It is common ground that the appellant's delay was "inexcusable". As well, I am willing to concede that the two-year delay was "inordinate". Thus it remains to be determined whether the respondent was "likely to be seriously prejudiced by the delay". In this regard the Motions Judge held [at page 5642]:

In order to succeed on an application to dismiss an action for want of prosecution, the defendant must show that there has been inordinate delay which is inexcusable and that it will

likely be seriously prejudiced by the delay. The general rule is that the longer the delay, the greater the likelihood of serious prejudice at the trial as the passage of time weakens witnesses' recollection of events.

In my respectful opinion, one should not presume serious prejudice because the delay is deemed inordinate. Nor I am persuaded that the "fading memory" rationale is applicable in the instant case. Unless a defendant leads evidence to that effect, one should refrain from speculating on the possible deleterious effects of inordinate delay.

I must confess that I am sceptical of the "fading memory" rationale being invoked as the sole basis on which to rest a decision to dismiss for want of prosecution. One need only take cognizance of the lengthy delays generally experienced throughout this country in bringing cases to trial to appreciate that the passage of time *simpliciter* is not regarded as an impediment to a fair trial, at least so far as civil actions are concerned. Moreover, cases such as *Farrar v. McMullen*, [1970 CanLII 555 \(ON CA\)](#), [1971] 1 O.R. 709 (C.A.) reveal that the burden of demonstrating sufficient prejudice is not easily met. In that case, the Ontario Court of Appeal declined to dismiss the action on the basis of delay despite the intervening death of the only witness who could testify on behalf of the defendant.

In my view, the Court should not assess the likelihood of serious prejudice in a factual vacuum. The complexity and nature of the case, the conduct of the respective solicitors, the kinds of issues under consideration, the physical and mental well-being of witnesses and the existence of documentary evidence are examples of matters which require careful consideration.

From the appeal record, it is apparent that the respondent offered no specific evidence which could reasonably be regarded as giving rise to a likelihood of serious prejudice.<sup>17\*<sup>ftnote</sup>17</sup> The fact that the litigation is concerned with the [CAD170]law of taxation" does not necessarily lead to the conclusion that the issues are, for example, complex. Moreover, on appeal, it simply maintained that such prejudice may properly be presumed and went on to speculate that serious prejudice "might have been found in the difficulty of operating a business while ensnared in a tax dispute for an inordinate time" (see respondent's memorandum of fact and law, paragraph 20, page 9). This argument might have been relevant had the respondent offered some supporting evidence. Alternatively, the respondent might have argued (which it did not) that the facts raised a rebuttable presumption of prejudice. But even if that argument were available, there is, in my opinion, sufficient evidence to rebut such a presumption.

Before the prothonotary, counsel for the respondent [at page 5546] "admitted that there was substantial evidence from the witness at the trial in the Tax Court" and hence the prothonotary observed "no doubt transcripts of that testimony will go far to refresh the witness's memory." The respondent's admission, in and of itself, undermines the validity of the "fading memory" rationale and, if necessary, would rebut any presumption of prejudice. Consequently, the onus would shift to the respondent (defendant) to prove actual prejudice. This is not to suggest that in law a rebuttable presumption arises where motions for dismissal for want of prosecution are involved. In my opinion, it is as much an error of law to place on the appellant (plaintiff) the onus of disproving the likelihood of serious prejudice which arises as a result of a presumption, as it is to presume prejudice because of a lengthy delay. On this point, I find

myself in respectful disagreement with the Motions Judge and my colleague MacGuigan J.A. Prejudice is being presumed and consequently the appellant bears the onus of refuting the possible adverse effects which the delay might have had on the respondent's case.

Finally, I think it important to emphasize that an order dismissing an action for want of prosecution is not intended to punish a plaintiff for its failure to proceed expeditiously. Its aim is to ensure that defendants are not exposed to "a substantial risk that a fair trial of the issues in the litigation will not be possible" (*per* Diplock L.J., *Allen v. McAlpine (Sir Alfred) & Sons, Ltd.*, *supra*, at page 556). In my opinion, the respondent failed to adduce the evidence necessary to demonstrate that it would be unable to obtain a fair trial on the issues.

I would allow the appeal in the manner proposed by the Chief Justice.

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by  for the  Federation of Law Societies of Canada

# T. Co. Metals LLC v. Vessel "Federal EMS", 2011 FC 1067 (CanLII)

Date: 2011-09-12

Docket: T-1613-08

URL: <http://canlii.ca/t/fn34j>

Citation: T. Co. Metals LLC v. Vessel "Federal EMS", 2011 FC 1067 (CanLII),  
<<http://canlii.ca/t/fn34j>> retrieved on 2014-01-11

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Reflex Related decisions, legislation cited and decisions cited

Record

Federal Court



Cour fédérale

Date: 20110912

Docket: T-1613-08

Citation: 2011 FC 1067

Ottawa, Ontario, September 12, 2011

PRESENT: The Honourable Mr. Justice Scott

**ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "FEDERAL EMS"  
AND *IN PERSONAM* AGAINST THE OWNERS, CHARTERERS AND ALL  
OTHERS INTERESTED IN THE VESSEL "FEDERAL EMS", CANADA MOON  
SHIPPING CO. LTD. AND FEDNAV INTERNATIONAL LTD.**

**BETWEEN:**

**T. CO. METALS LLC**

**Plaintiff**

**and**

**THE VESSEL "FEDERAL EMS",  
THE OWNERS, CHARTERERS  
AND ALL OTHERS INTERESTED  
IN THE VESSEL  
"FEDERAL EMS",  
CANADA MOON SHIPPING CO.  
LTD.  
and  
FEDNAV INTERNATIONAL LTD.**

**Defendants  
Respondents**

**and  
COMPANHIA SIDERURGICA  
PAULISTA -COSIPA**

**Third Party  
Appellant**

**REASONS FOR ORDER AND ORDER**

**I. NATURE OF THE MATTER**

[1] This is an appeal to set aside the Order dated March 10, 2011 of Prothonotary Richard Morneau, Esq. (Motion Doc. No 62), by which he dismissed the Motion for a Stay of Proceedings of the third party, Companhia Siderurgica Paulista [COSIPA].

[2] There exists another proceeding (T-2020-08: *T. Co. Metals LLC v The Vessel "Federal St. Laurent" et al*), to which Prothonotary Morneau's Order applied *mutatis mutandis*. The third party did not file a similar motion in Docket T-2020-08, but requests that the order issued in this matter apply *mutatis mutandis* to the other proceeding as well. Both the respondent and the plaintiff agree.

[3] The Court orders that this order shall apply also to docket T-2020-08.

[4] For the reasons that follow this appeal is allowed.

**II. FACTS**

**A. Background to the main action between T. Co. Metals LLC and The Vessel "Federal EMS" et al.**

[5] As the basic findings of Prothonotary Morneau are not contested by COSIPA (the appellant), Canada Moon Shipping Co. Ltd. and Fednav International Ltd. (the respondents) or T. Co. Metals LLC (the plaintiff), the Court finds it appropriate to reproduce paragraphs 4 to 17 of the prothonotary's Reasons for Order [2011 FC 291 \(CanLII\)](#), (2011 FC 291), in which are set

out the background facts. Those paragraphs read as follows:

[4] On October 20, 2008, the plaintiff T. Co. Metals LLC (T.Co), as owner of a cargo of 806 cold-rolled steel coils, commenced an action in this docket against, *inter alia*, the defendants Canada Moon and Fednav for a capital sum of C\$2,450,000 for damages to that cargo as a result of the defendants carrying it by sea from the port of Piaçaguera in Brazil to the final port of Toronto, Canada, on board the ship *Federal Ems* (the Ship), owned by Canada Moon.

[5] COSIPA manufactures and exports steel products. Since at least 1996, it has called upon Fednav under similar conditions to transport its products from Brazil to North American ports.

[6] When the cargo was loaded on board the Ship on or about November 16, 2004, the master of the Ship issued two bills of lading (the Bills of lading).

[7] Each bill of lading incorporated by reference a charter party in the following terms: “Subject to all terms, conditions, clauses and exceptions as per charter party dated July 28, 2004 at Rio de Janeiro including arbitration clause”.

[8] The charter party was actually signed on July 22, 2004. This fact does not cause a problem in this case.

[9] It constituted, in fact, a charter party voyage (the Charter party), and the Court understands that it was signed by COSIPA as the voyage charterer and FedNav Ltd. as the disponent owner. It appears, at least for the purposes of this motion, that at all relevant times FedNav Ltd. acted as an agent, *inter alia*, of Fednav, and consequently the Court will refer to Fednav to designate both interchangeably.

[10] We note here that the Charter party contained various clauses including an arbitration clause, which can be found at clause 19. This clause is entitled “Law and Arbitration” and reads as follows (Arbitration clause 19):

(b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of

Maritime Arbitrators, Inc.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 24 the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.

(c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the places indicated in Box 25, shall govern this Charter Party.

[Emphasis added.]

[11] The Charter party also contained a clause relieving the owners, here essentially Fednav, from liability and imposing, *inter alia* on the charterer, here COSIPA, the risks and liabilities for everything related to the loading and good condition of the cargo. This clause 5(a) reads as follows:

5. Loading/Discharging

(a) Costs/Risks (See Clauses 22 + 40)

The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed, and/or secured by the Charterers and taken from holds and discharged by the receivers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required from the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board.

[12] Another document that should be mentioned is a letter of indemnity (Letter of Indemnity or LOI) dated at São Paulo, Brazil, November 10, 2004, i.e. after the Charter party was signed and a few days before the cargo was loaded on the Ship.

[13] The LOI was aimed at resolving a difference of opinion that arose between the parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting; COSIPA was in favour of this method while Fednav was against it because it believed that doing so would cause condensation or moisture on the metal.

[14] The LOI reads as follows:

São Paulo, November 10<sup>th</sup>, 2004.

To: Fednav Limited

Re: M/V FEDERAL EMS

22,740 mt of steels prod. Piaçaguera/Philadelphia, Toronto and Hamilton

COSIPA/Fednav – C/P's dated July 22<sup>nd</sup> and September 21<sup>st</sup>, 2004

Dear Sirs,

Upon request of Companhia Siderurgica Paulista – COSIPA, as Charterers, we herewith confirm that the cargo of steel products loaded on board of M/V Federal Ems at Piaçaguera and destined to Philadelphia, Toronto and Hamilton was covered with plastic sheets.

Provided that Owners/Master ensure that the vessel's ventilation system will be properly functioning during all voyage, Charterers hereby confirm that they will relieve Master / Vessel / Owners / Managers from any liability, and will hold them harmless for any possible cargo damage by moisture condensation under the plastic cover as a result of restricted ventilation of the cargo.

Yours faithfully,

(signed)

João Carlos de S. Tranjan

Cia.Siderurgica Paulista - COSIPA

[15] It was on the basis, *inter alia*, of clause 5(a) of the Charter party and the LOI that the defendants filed a defence with the Court on November 26, 2008, as well as a separate Third party claim against COSIPA.

[16] In the Third party claim, the defendants make the following allegations:

6. The cargo was shipped pursuant to a voyage charter in Gencon Form dated at Rio de Janeiro, Brazil, July 22, 2004, between Fednav Limited as disponent owner, and the Third Party as charterer.

7. Under Clause 5 of the said charter party, the cargo was to be brought into the holds, loaded, stowed, tallied and/or



secured by the Third party and was, in fact, loaded, stowed and secured by the Third Party.

8. At time of loading, the Third party covered the cargo with plastic sheets and by letter to Fednav Limited dated at São Paulo, Brazil, November 10, 2004, gave an undertaking that, provided the vessel's ventilation system functioned properly during the voyage, it would relieve the Master, Owners and managers of the vessel from any liability and would hold them harmless for cargo damage resulting from moisture condensation under the plastic sheeting as a result of restricted ventilation of the cargo.

9. In entering into the voyage charter party and receiving the aforementioned hold harmless letter, Fednav Limited was acting as agent on behalf of the Defendants.

10. In the principal action, the Defendants have pleaded that they are not liable to the Plaintiff for any damage resulting from loading, stowage or handling of the cargo, because these operations were not performed by them and were to be performed by the Third Party free of any risk, liability and expense whatsoever to them.

11. Should it be determined by the Court that these defences cannot be raised against the Plaintiff, as bills of lading holder or otherwise, the Defendants are entitled to contribution or indemnity from the Third Party for any amount they will be ordered to pay the Plaintiff for such damage.

12. In addition, should the Court hold the Defendants liable to the Plaintiff for damage resulting from moisture condensation under the plastic sheeting, the Defendants similarly are entitled to contribution or indemnity from the Third Party for such damage.

[17] The defendants had to ask this Court to issue a letter rogatory to serve their Third party claim on COSIPA.

[6] On October 20, 2008, the plaintiff, T. Co. Metals LLC, as owner of a cargo of 806 cold-rolled steel coils, commenced an action in this docket against, *inter alia*, the defendants, Canada Moon Shipping Co. Ltd. (Canada Moon) and Fednav International Ltd. (Fednav), for a capital sum of C\$2,450,000 for damage to that cargo as a result of the defendants carrying it by sea from the port of Piaçaguera in Brazil to the final port of Toronto, Canada, on board the ship *Federal Ems* (the Ship), owned by Canada Moon.

[7] COSIPA manufactures and exports steel products. Since at least 1996, it has called upon Fednav, under similar conditions, to transport its products from Brazil to North American ports.

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[9] Each bill of lading incorporated by reference a charter party, in the following terms: “Subject to all terms, conditions, clauses and exceptions as per charter party dated July 28, 2004 at Rio de Janeiro including arbitration clause”.

[10] The charter party was actually signed on July 22, 2004. This fact does not cause a problem in this case.

[11] It constituted, in fact, a voyage charter party (the charter party), and the Court understands that it was signed by COSIPA, as the voyage charterer, and FedNav Ltd. as the disponent owner. It appears, at least for the purposes of this motion, that at all relevant times, FedNav Ltd. acted as an agent, *inter alia*, of Fednav, and consequently, the Court will refer to Fednav to designate both, interchangeably.

[12] We note here that the charter party contained various clauses including an arbitration clause, which can be found at clause 19. This clause is entitled “Law and Arbitration” and reads as follows (arbitration clause 19):

(b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25 the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.

(c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the places indicated in Box 25, shall govern this Charter Party.  
[Emphasis added.]

[13] The Charter party also contained a clause relieving the owners, here essentially Fednav,

from liability and imposing, *inter alia* on the charterer, here COSIPA, the risks and liabilities for everything related to the loading and good condition of the cargo. This clause, namely clause 5(a), reads as follows:

- 5. Loading/Discharging
- (a) Costs/Risks (See Clause[s] 22 + 40)

The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed, and/or secured by the Charterers and taken from holds and discharged by the receivers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board.

[14] Another document that should be mentioned is a letter of indemnity (Letter of Indemnity or LOI) dated at São Paulo, Brazil, November 10, 2004, i.e. after the Charter party was signed and a few days before the cargo was loaded on the Ship.

[15] The LOI was aimed at resolving a difference of opinion that arose between the parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting; COSIPA was in favour of this method while Fednav was against it because it believed that doing so would cause condensation or moisture on the metal.

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To: Fednav Limited  
Re: M/V FEDERAL EMS  
22,740 mt of steels [*sic*] prod. Piaçaguera/Philadelphia,  
Toronto and Hamilton  
COSIPA/Fednav – C/P's dated July 22<sup>nd</sup> and September 21<sup>st</sup>,  
2004

Dear Sirs,

Upon request of Companhia Siderurgica Paulista – COSIPA, as Charterers, we herewith confirm that the cargo of steel products loaded on board of M/V Federal Ems at Piaçaguera and destined to Philadelphia, Toronto and Hamilton was covered with plastic sheets.

Provided that Owners/Master ensure that the vessel's ventilation system will be properly functioning during all voyage, Charterers hereby confirm that they will relieve Master / Vessel / Owners / Managers from any liability, and will hold them harmless for any possible cargo damage by moisture condensation under the plastic cover as a result of restricted ventilation of the cargo.

Yours faithfully,

(signed)

\_\_\_\_\_  
João Carlos de S. Tranjan  
Cia.Siderurgica Paulista - COSIPA

[17] It was on the basis, *inter alia*, of clause 5(a) of the charter party and the LOI that the defendants filed a defence with the Court on November 26, 2008, as well as a separate third party claim against COSIPA.

[18] In the third party claim, the defendants make the following allegations:

6. The cargo was shipped pursuant to a voyage charter in Gencon Form dated at Rio de Janeiro, Brazil, July 22, 2004, between Fednav Limited as disponent owner, and the Third Party as charterer.
7. Under Clause 5 of the said charter party, the cargo was to be brought into the holds, loaded, stowed, tallied and/or secured by the Third Party and was, in fact, loaded, stowed and secured by the Third Party.
8. At time of loading, the Third Party covered the cargo with plastic sheets and by letter to Fednav Limited dated at São Paulo, Brazil, November 10, 2004, gave an undertaking that, provided the vessel's ventilation system functioned properly during the voyage, it would relieve the Master, Owners and managers of the vessel from any liability and would hold them harmless for cargo damage resulting from moisture condensation under the plastic sheeting as a result of restricted ventilation of the cargo.
9. In entering into the voyage charter party and receiving the aforementioned hold harmless letter, Fednav Limited was acting as agent on behalf of the Defendants.
10. In the principal action, the Defendants have pleaded that they are not liable to the Plaintiff for any damage resulting from loading, stowage or handling of the cargo, because these operations were not performed by them and were to be performed by the Third Party free of any risk, liability and expense whatsoever to them.
11. Should it be determined by the Court that these defences cannot be raised against the Plaintiff, as bills of lading holder or otherwise, the Defendants are entitled to contribution or indemnity from the Third Party for any amount they will be ordered to pay the Plaintiff for such damage.
12. In addition, should the Court hold the Defendants liable to the

Plaintiff for damage resulting from moisture condensation under the plastic sheeting, the Defendants similarly are entitled to contribution or indemnity from the Third Party for such damage.

[19] The defendants had to ask this Court to issue a letter rogatory to serve their third party claim on COSIPA.

## **B. Motion underlying the impugned decision**

[20] COSIPA filed a motion on August 31, 2009, seeking a stay of the respondent's third party claim in favour of arbitration in New York based on the arbitration provision in clause 19 of the charter party. COSIPA had also requested, in the alternative, that the third party claim against it be stayed in favour of proceedings in the Brazilian courts on the basis of the doctrine of *forum non conveniens*.

## **C. Present motion and relief requested by COSIPA**

[21] The appellant's present motion, brought pursuant to [rules 51](#) and [359](#) of the *Federal Courts Rules*, is an appeal of the prothonotary's order dismissing the original motion for a stay of the third party claim. In this appeal, the appellant requests from the Court an order:

- 1) Setting aside the order of Prothonotary Morneau dated March 10, 2011, in which he dismissed the Motion for a Stay of Proceedings of the third party, COSIPA;
- 2) Staying the present third party claim in favour of arbitration in New York City, in accordance with the terms of the applicable charter party;
- 3) Alternatively, staying the present third party claim in favour of proceedings in a more appropriate forum, in Brazil, in accordance with the doctrine of *forum non conveniens*;
- 4) In the further alternative, granting an extension of time for COSIPA to file a statement of defence with respect to the third party claim;
- 5) Granting to the third party the costs of the motion heard by the prothonotary and of the present appeal;
- 6) Applying *mutatis mutandis* to action T-2020-08 the results of this appeal.

[22] The appellant further emphasizes that the order herein is vital to the final issue of the third party claim, as a stay of proceedings would put an end to the jurisdiction of this Court on the merits of the third party claim.

## **D. Impugned decision of Prothonotary Morneau**

[23] Prothonotary Morneau, in his Reasons for Order of March 10, 2011, made three findings that are disputed in the present appeal.

[24] Firstly, the prothonotary agreed with COSIPA's submission that the Letter of Indemnity signed between it and Fednav should be regarded as an amendment to the charter party rather than a separate agreement, as is argued by the respondents.

[25] In his decision, the prothonotary reasoned that the LOI was drafted in order to reassure Fednav (para 24), that it was intended to resolve a difference of opinion that arose between the

parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting, and that the fact that it serves as an amendment to the charter party is reinforced by the subject line of the LOI, which references directly the charter party.

[26] Secondly, Prothonotary Morneau analyzed [subsection 46\(1\)](#) of the *Marine Liability Act* (the *Act*) and agreed with the respondent's identification of the purpose and key elements of the provision. Specifically, the prothonotary accepted the respondent's submissions and found that, in order for [section 46](#) to apply, it must be shown that:

- a) there is:
  - i. a contract for the carriage of goods by water
  - ii. to which the *Hamburg Rules* do not apply, and
- b) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada, or
- c) the defendant has a place of business or an agency in Canada, or
- d) the contract was concluded in Canada.

[27] The main subject of dispute between the applicant and respondent was whether a charter party constitutes "a contract for the carriage of goods by water" under [section 46](#). If so, the prothonotary reasoned, that it would favour the respondent in the motion and prevent clause 19 of the charter party from ousting the jurisdiction of the Federal Court over the third party claim against COSIPA (para 29).

[28] On this issue, the prothonotary found he could not agree with COSIPA's submissions. COSIPA had made a comparison between section 46 and article 21 of the *Hamburg Rules*. Although the prothonotary agreed that various decisions and authorities confirm the similarity of those two provisions, the *Hamburg Rules* (article 2(3)) expressly provide that they do not apply to charter parties (para 35-36). He reasoned that the *Marine Liability Act* did not expressly exclude charter parties and that, since the *Hamburg Rules* are included in a schedule to the said *Act*, had Parliament wanted to clearly exclude charter parties from [section 46](#), it would have done so (para 37). Moreover, the various comments made by COSIPA regarding the Parliamentary debates surrounding the enactment of the *Marine Liability Act* did not support a finding that [section 46](#) did not contemplate the relationship between a charterer and a disponent owner (para 39).

[29] Finally, the prothonotary considered COSIPA's alternative argument that Canada is a *forum non conveniens*. That is a determination which is governed by the Federal Court of Appeal decision in *Mazda Canada Inc v Cougar Ace (The)*, [2008 FCA 219 \(CanLII\)](#), [2009] 2 FCR 382 [*Cougar Ace*]. The *Cougar Ace* decision emphasized that the Court will intervene only exceptionally with respect to the forum chosen by a plaintiff (here, the defendants), only doing so where the choice is "clearly inappropriate compared to another obviously superior jurisdiction" (para 43). The Federal Court of Appeal decision also referred to the 10 factors set out in *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002 SCC 78 \(CanLII\)](#), [2002] 4 SCR 205 [*Spar Aerospace*], to be weighed by the Court in making a determination of *forum non conveniens*.

[30] Prothonotary Morneau weighed each factor from *Spar Aerospace* and made the following determinations:

- 1. the parties' residence and that of witnesses and experts → this factor is neutral

- or at best, Brazil has a small advantage;
- 2. the location of the material evidence → this factor favours Canada;
- 3. the place where the contract was negotiated and executed → this factor is neutral;
- 4. the existence of proceedings pending between the parties in another jurisdiction → this factor favours Canada;
- 5. the location of the defendant's assets → this factor favours Brazil;
- 6. the applicable law → the applicable law is that of New York, so this factor is neutral;
- 7. advantages conferred upon the plaintiff by its choice of forum, if any → this factor favours Canada, as two of the three parties support the jurisdiction of the Federal Court;
- 8. the interests of justice → this factor favours Canada;
- 9. the interests of the parties → this factor favours Canada;
- 10. the need to have the judgment recognized in another jurisdiction → this factor favours Brazil.

[31] In sum, the prothonotary concluded that COSIPA failed to demonstrate that the Federal Court is clearly inappropriate and that Brazil is an obviously superior jurisdiction.

### III. ISSUES

[32] This appeal raises the following three issues:

- 1) *What is the standard of review for the appeal of the prothonotary's Order?*
- 2) *Does the definition of "contract for the carriage of goods by water" in subsection 46(1) of the Marine Liability Act encompass an agreement to hire a vessel by way of a charter party?*
- 3) *Is there a forum more convenient for the hearing of the dispute between COSIPA and the defendants (respondents) than the Federal Court?*

### IV. RELEVANT PROVISIONS

[33] The relevant provisions are appended to this decision.

### V. SUBMISSIONS OF PARTIES AND ANALYSIS

1. *What is the standard of review for the appeal of the prothonotary's Order?*

#### Appellant's submissions

[34] The appellant submits that the prothonotary's Order is to be reviewed *de novo* on the standard set out in *Merck v Apotex*, below. Had the motion been granted, it would have put an end to the third party proceedings in the Federal Court in favour of proceedings in New York (arbitration) or Brazil (courts). Therefore, the questions raised in the motion for a stay are vital to the third party claim.

## Respondents' submissions

[35] The respondents agree that the interpretation of [section 46](#) of the *Marine Liability Act* and whether this Court is a *forum non conveniens* are questions vital to the issues herein and, hence, that the prothonotary's Order should be reviewed *de novo* (respondent's Written Representations at para 14).

[36] The respondents note that but for [section 46](#) of the *Marine Liability Act* they would have had no choice but to pursue the appellant via arbitration in New York (respondent's Written Representations at para 15).

[37] They also argue, alternatively, that if they cannot avail themselves of [section 46](#), the agreement to arbitrate should be declared inoperative pursuant to article 8(1) of the *Commercial Arbitration Code*, due to the LOI (respondent's Written Representations at para 16), which, they claim, constitutes an implied waiver of any agreement to arbitrate in the event of any proceedings instituted by a third party cargo interest such as the plaintiff and an explicit waiver of any right to raise a *forum non conveniens* objection.

## Analysis

[38] As noted in a previous appeal of an Order by Prothonotary Morneau in this case (judgment rendered by Justice Yvon Pinard, on September 21, 2010), the applicable test governing appeals from a prothonotary's decision is set out in *Canada v Aqua-Gem Investments Ltd*, 1993 CanLII 2939 (FCA), [1993] 2 FC 425 (QL) (CA), as follows:

**95** ... discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

- (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
- (b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[39] The test was reformulated in *Merck & Co. v Apotex Inc*, 2003 FCA 488 (CanLII), 2003 FCA 488, to read as follows:

... "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."



(See also: *ZI Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27 (CanLII), 2003 SCC 27, [2003] 1 SCR 450.)

[40] If the stay of proceedings is granted to the third party, COSIPA, the third party claim by COSIPA against the respondents will be taken out of the Federal Court. This is certainly vital to the final issue in the third party claim, which is whether the defendants are entitled to contribution or indemnity from COSIPA.

[41] Arguably, a stay of proceedings would also deprive the respondents of the evidence they need to defend the main action; that is, their defence would be incomplete without the presence of COSIPA to defend its use of the plastic sheeting (see respondent's Written Representations at p 29). This is also vital to the final issue of the main action and, consequently, it is this Court's determination that a *de novo* review is appropriate.

**2. *Does the definition of “contract for the carriage of goods by water” in subsection 46(1) of the Marine Liability Act encompass an agreement to hire a vessel by way of a charter party?***

**Appellant's submissions**

**1) Source of contract**

[42] The appellant submits that even if a bill of lading is issued, the charter party is still the contract of carriage and the Court should therefore refer the matter to arbitration (appellant's Written Representations at para 106-114). In the carriage of goods at issue, the appellant (the shipper and voyage charterer) received bills of lading from Fednav; these functioned only as receipts for the goods loaded aboard the ship since the documents remained in the appellant's hands. The charter party remained at all times the applicable and binding contract for the carriage of goods.

**2) Letter of Indemnity**

[43] The appellant also preemptively countered the respondent's argument that the Letter of Indemnity is a separate contract from the charter party (appellant's Written Representations at para 115-131). The appellant submits that this is a question within the arbitrator's jurisdiction, but that it is apparent that the LOI, on its face, is an amendment to the charter party. The heading of the LOI supports this proposition, as does the fact that the terms of the LOI restate clauses already in the charter party. It was the understanding of the appellant's representative, Mr. Eduardo Vieira Munhoz, that the LOI was an amendment to the charter party. Mr. Munhoz was not, however, cross-examined on this. Finally, the appellant argues that it never received any consideration based on the LOI; consequently, no separate contract could have arisen. It is the appellant's view that since the LOI was an amendment to the charter party, it cannot affect the referral of the matter to arbitration, which was agreed to between the parties in their original charter party agreement.

**3) Statutory interpretation**

[44] The appellant's main contention is that charter parties, such as the voyage charter used in this case, are excluded from [section 46](#) of the *Marine Liability Act*, since Parliament based that section on the *Hamburg Rules*, which expressly exclude charter parties. Moreover, the fact that a bill of lading was issued on behalf of the master of the vessel does not alter the analysis of [section 46](#) of the *Marine Liability Act* (appellant's Written Representations at para 50).

[45] The appellant presents several arguments to support this contention.

- Firstly, it submits that the prothonotary erred in his interpretation of the *Marine Liability Act* under the principles of statutory interpretation outlined in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 (CanLII), 2005 SCC 54 at para 10 [*Canada Trustco Mortgage*] and *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 (CanLII), 2011 SCC 1 at para 21 [*Celgene Corp*]. Specifically, it claims that the prothonotary ignored the definition of “contract for the carriage of goods by water” within the scheme of the *Act*, misconstrued the purpose of the *Act* as also including sophisticated chartering arrangements rather than being to protect shippers and consignees, and misconstrued Parliament's intention to exclude charter parties (appellant's Written Representations at para 51-53).
- The appellant further argues that the exclusion of charter parties from the *Act* conforms to the scheme of the *Act* (appellant's Written Representations at para 54-65), the object of [section 46](#) of the *Act* (appellant's Written Representations at para 66-77), and Parliament's intention to protect Canadian shippers and receivers under bills of lading, because these are essentially contracts of adhesion. (appellant's Written Representations at para 78 - 101). Furthermore, the appellant contends that [section 46](#) must be interpreted in light of Canada's international obligations (appellant's Written Representations at para 102-105).

#### 4) Scheme of the *Act*

[46] Essentially, the appellant argues that the *Act* must be interpreted in light of the definitions in the *Act* itself and its schedules. The *Hamburg Rules* are appended thereto as a schedule, and they explicitly exclude charter parties ([article 2\(3\)](#)). Given the similarity in drafting and intention between [article 21](#) of the *Hamburg Rules* and [section 46](#) of the *Act*, these provisions, the appellant argues, should be interpreted similarly. The *Hague-Visby Rules* are likewise appended to the *Act* as a schedule, and the definition of “contract of carriage” in those rules also excludes charter parties, so it is the appellant's position that the term “contract of carriage” in the *Act*, properly construed within the scheme of the *Act*, must exclude charter parties.

#### 5) Object of [section 46](#)

[47] The appellant argues that the object of [section 46](#) was to incorporate a strikingly similar provision to that in the *Hamburg Rules*. It was meant to be an advanced incorporation of part of the *Hamburg Rules* and will become mostly redundant once the *Hamburg Rules* come into force. The appellant cites several academic and Parliamentary examples showing that [section 46](#) of the *Act* is indeed reflective of [articles 21 and 22](#) of the *Hamburg Rules*. The appellant argues that it is illogical to assign to [section 46](#), a transitional provision, a wider scope than the international convention (the *Hamburg Rules*, once they come into force) that will replace it.

## 6) Parliament's intention

[48] The appellant submits that Parliament's stated intention was to benefit Canadian shippers and receivers, not shipowners and chartering companies such as Fednav and Canada Moon. It refers to several articles, books, and statements made before Parliamentary committees to support this assertion. There is a distinction between bills of lading (contracts for the carriage of goods) and charter parties (contracts for the hire of a ship or her services), and this distinction relates to the differences in the negotiation dynamics of the two instruments. While the bill of lading is often treated as a contract of adhesion, with little bargaining, between contracting parties, charter parties are contracts negotiated in the free market, where the respective weight of the negotiating parties has a direct impact on the final provisions found in that contract. Thus, it is illogical to apply [section 46](#) to charter parties, which are not regulated, as are bills of lading, to protect weaker parties.

## 7) Canada's international obligations

[49] The appellant argues that any doubt as to the applicability of [section 46](#) should be resolved in favour of enforcing the arbitration clause of the "Gencon (standard form) Charter Party". This is supported by Canada's acceptance of international commercial arbitration as a mode of dispute resolution (as Canada's *United Nations Foreign Arbitral Awards Convention Act* gives force of law to the New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the *Commercial Arbitration Code* does so for the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration).

## Respondents' submissions

### 1) Source of contract

[50] The respondents admit that the charter party is the contract of carriage between Fednav and the appellant, COSIPA. They argue, however, that this is not the case with respect to the defendant Canada Moon Shipping and the appellant. The respondents maintain that, in this latter case, the contractual relationship is governed by the bill of lading, even though it incorporates the terms and conditions of the charter party. They submit that, in the event that the Court were to find that [section 46](#) does not apply to charter parties, Canada Moon would still have recourse under [section 46](#) because it is a party to a contract of carriage evidenced by a bill of lading. The respondents contend that this distinction was not properly considered by Prothonotary Morneau.

### 2) Letter of Indemnity

[51] The respondents also argue that the Letter of Indemnity is a separate agreement which constitutes an implied waiver of any agreement to arbitrate and an explicit waiver of any right to raise a *forum non conveniens* objection. There is no evidence, other than self-serving statements of the appellant's representative, to suggest that the LOI was an amendment to the charter party. The wording, according to the respondents, does not give Fednav any rights beyond those that Fednav already had under the charter party. The LOI was redrafted by the appellant to include the wording repeating clause 5(a) of the charter party, but does not incorporate the jurisdiction,

choice of law or arbitration clauses found in the charter party.

### 3) Statutory interpretation

[52] Applying the test—that was repeated by Prothonotary Morneau in his order—for the applicability of [section 46](#) of the *Marine Liability Act*, the respondents state that:

- a) there is:
  - i) a “contract for the carriage of goods by water”, as this term is all-inclusive and had Parliament intended to restrict its meaning, it would have done so,
  - ii) to which the *Hamburg Rules* do not apply, as they have never been declared in force in Canada,
  - iii) and the contract provides for the adjudication of claims in a place other than Canada, as the bills of lading incorporate by reference an agreement to arbitrate disputes in New York and there is also such an agreement in the charter party;
- b) the port of discharge under the contract was in Canada (Toronto) and the cargo was in fact discharged in Canada: and
- c) neither (c) nor (d) of the test are applicable in this case.

[53] Contrary to the appellant’s submission, the respondents argue that on a plain reading of [section 46](#) either party to a contract for the carriage of goods by sea may invoke the rights conferred by that section and that there is no ambiguity or lack of clarity as to the provision’s meaning that would justify recourse to external aids in order to understand the sense of the words used in [section 46](#).

[54] The respondents argue that there is no restriction on the scope of the expression “contract for the carriage of goods” in [section 46](#). They also submit that the appellant argues for a restrictive approach to the section which ignores section 12 of the *Interpretation Act* and Ruth Sullivan’s caution that freedom of contract must be counterbalanced with other values that Parliament seeks to protect, namely, the right of access to Canadian courts for shippers and receivers.

[55] The respondents further submit that there is no restriction on the nature of the interest a party must have under [section 46](#) in order to be a “claimant”. According to the respondents, the essence of the appellant’s argument is that it was Parliament’s intention to extend [section 46](#) rights to cargo interests, but not to carrier’s interests. The respondents contend that there is no evidence that denies the availability of the right to sue to carrier interests. Moreover, a statute’s meaning should not be interpreted in light of what those present at Senate hearings wanted the statute to mean, but according to what Parliament’s elected representatives finally decided. The respondents submit that the assertion that cargo interest claimants can only exercise [section 46](#) rights when they are holders of a bill of lading is wrong and unsupported.

[56] According to the respondents, Parliament clearly intended to address the rights of litigants whose claims arose from a contract for the carriage of goods, regardless of the instrument used to evidence the contract. There are various functions of a charter party which, they submit, are ignored by the appellant, including the fact that it can be in the nature of a contract for the carriage of goods by sea, whether or not a bill of lading is issued (*Lantic Sugar*

*Ltd v Blue Tower Trading Corp* [reflex](#), (1991), 52 FTR 161, 30 ACWS (3d) 1001, [1991] FCJ No 1309 (QL); *Thyssen Canada Ltd v Mariana (The)*, [2000 CanLII 17113 \(FCA\)](#), [2000] 3 FC 398 ).

[57] The respondents also submit that, as to the appellant's argument regarding Canada's international obligations, Parliament clearly intended to render inapplicable certain provisions of international conventions with respect to arbitration. Canada, according to the respondents, is not an exception in this regard, as several countries have legislated to limit the ousting of their jurisdiction. Nothing in the conventions prevents states from legislating to render arbitration agreements inoperative or to restrict their enforcement. In any event, the presumption that legislation conforms to international obligations is rebuttable.

### Analysis

[58] The following issues need to be addressed:

- *Firstly, is the appellant's position correct that the contract of carriage between the appellant and the respondents is still the charter party because, even though bills of lading were issued, as they never left the appellant charterer's hands, they cannot act as a contract of carriage but serve merely as receipts?*
- *Secondly, is the appellant's position correct that the LOI is an amendment to the charter party?*
- *Finally, does the term "contract for the carriage of goods" in section 46 of the Marine Liability Act exclude charter parties?*

### *What is the source of the contract between the appellant and the respondents?*

[59] Prothonotary Morneau concluded that the contract between Fednav and COSIPA is found primarily in the charter party rather than in the bills of lading. This is the approach argued for by the appellant. The Court agrees with that finding for the following reasons:

- The respondents admit that the source of the contract for the carriage of goods between COSIPA and Fednav is the charter party, but assert that the bill of lading governs the contract for the carriage of goods between COSIPA and Canada Moon. The Court disagrees with this position and agrees with the appellant's position that the bills of lading functioned only as receipts for the goods loaded aboard the ship, since they remained in the hands of COSIPA and never passed to a third party. In this respect, it is interesting to read Professor John Wilson in *Carriage of Goods by Sea* (London: Pearson Longman, 2008), at p 6-7, where he discusses the situation in which charter parties and bills of lading are used simultaneously:  
  
... Thus charterers shipping their own goods on a chartered vessel require at least an acknowledgement of the quantity of goods taken aboard and the condition in which they were shipped. Bills issued to a charterer in such circumstances act merely as receipts for the cargo shipped and as potential documents of title should the charterer decide

to sell the goods while they are still in transit. But the bills provide no evidence of the terms of the contract of carriage between shipowner and charterer since their relationship is governed solely by the terms of the charterparty. Nor will the Hague or Hague/Visby Rules apply to the contract of carriage while the bill remains in the hands of the charterer, although they will apply as soon as the cargo is sold and the bill negotiated to a third party.

- The respondent Fednav itself claims to have acted as agent for the shipowner, Canada Moon Shipping (Affidavit of Dong Li, Motion Record of the appellant at Tab 6, p 5, para 16 referencing the Letter of Indemnity).
- More importantly, the respondents admit that the bills of lading incorporated the Gencon standard form charter party by reference. Thus, the charter party would still remain the applicable contract for the carriage of goods between the defendants (Fednav and Canada Moon Shipping) and the appellant.

**Is the Letter of Indemnity an amendment to the charter party?**

[60] Prothonotary Morneau agreed with the appellant that the LOI constituted an amendment to the charter party rather than a separate agreement. The Court accepts this finding as, on its face, as correctly noted by the prothonotary and the appellant, the LOI constitutes a modification of the charter party in view of its subject line:

Re: ...COSIPA/Fednav – C/P's dated July 22<sup>nd</sup> and September 21<sup>st</sup>, 2004.

[61] Further, although the respondents submit that the LOI was an implied waiver of any agreement to arbitrate and an explicit waiver of any right to raise a *forum non conveniens* objection, there is nothing in the e-mail negotiation of the LOI (affidavit of Mr. Munhoz at Exhibit D) to support this contention. Certainly, there are conflicting and self-serving statements by Mr. Munhoz (COSIPA) and Mr. Li (Fednav) as to the intention of their respective companies in drafting the LOI.

[62] The representative of the respondents, Mr. Dong Li, states that the purpose of the LOI was not to amend the charter party, which adequately protects “owners” or “disponent owners” (clause 5(a)), but to protect against indemnity claims against the “Master/Vessel/Owners/Managers” and/or by cargo interests (such as the plaintiff), arising out of the use of plastic sheets (Affidavit of Dong Li at para 19).

[63] Clause 5(a) reads as follows:

**5. Loading Discharging**

**(a) Costs/ Risks (See Clauses 22 + 40)**

The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers and taken



from holds and discharged by the Receivers, free of any risk, liability and expense whatsoever to the Owners.

The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board. . . .

[64] Clause 45E), however, specifies that:

**Whenever Charterers/Shippers cover the cargoes with plastic canvas in order to protect them during the voyage, Owners guarantee that said plastic canvas placed at loadport will be withdrawn only at the time of discharge of cargoes at respective disports [sic].**

Should Owners fail in fulfilling the above they will be fully responsible for any penalty, charges, extra expenses, etc. that Charterers may face arising therefrom.

[65] The Court does not agree with the respondent's argument, since the LOI clearly adds to the protection offered already to the owners by way of clause 5(a) of the charter party, and also acts as an addition to rider clause 45E), stating that when the charterers use plastic sheets, the owners will not remove those sheets until discharge of the cargo. The e-mail exchange indicates that COSIPA realized that it was liable for any moisture problems arising from the use of plastic sheets, and thus the LOI can only be seen as an added benefit to the defendants, putting in clearer terms, and within the scope of the agreed upon charter party, the fact that COSIPA was responsible for the use of the plastic sheets. In Exhibit D to the affidavit of Mr. Munhoz is an e-mail from a member of COSIPA's chartering division which states:

4. As long as it is clearly stated on the governing C/P (cl. 45.E) that "whenever Charterers/Shippers cover the cargoes with plastic canvas in order to protect them during the voyage, Owners guarantee that . . ." we understand that it is our responsibility any possible problem with the cargo by moisture condensation under the plastic cover.

[66] Based on the preceding analysis, the Court finds the appellant's contention that the LOI is an amendment to the charter party to be correct.

### **Statutory interpretation of the expression "contract for the carriage of goods by water" in section 46**

[67] The basic principles of statutory interpretation were discussed in *Canada Trustco Mortgage*, above:

**10** It has been long established as a matter of statutory interpretation that "the words of an [Act](#) are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the [Act](#), the object of the [Act](#), and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999 CanLII 639 \(SCC\)](#), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory

provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the [Act](#) as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an [Act](#) as a harmonious whole.

[68] The Supreme Court repeated *Canada Trustco Mortgage*’s statutory interpretation principles recently in *Celgene Corporation*, above, stating at paragraph 21: “The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.”

### Ordinary meaning

[69] As noted by Prothonotary Morneau, the expression “contract for the carriage of goods by water” is not defined in the [Marine Liability Act](#). Ruth Sullivan notes that the expression “ordinary meaning” is used inconsistently, sometimes meaning a term’s dictionary meaning, literal meaning or meaning derived from reading the words in their literary context (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at p 25). She further writes that:

Most often . . . ordinary meaning refers to the reader’s first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context . . . [p 25-26]

[70] One dictionary meaning of the word “carriage” is “the conveying of goods”. So, in its ordinary sense, the expression “contract for the carriage of goods by water” would appear to mean a contract or agreement which provides for the conveying of goods by water—on a vessel, for example. This supports the inclusion of charter parties in [section 46](#) of the [Marine Liability Act](#), as they are agreements between a charterer and a disponent owner whereby the charterer hires a vessel to convey goods, or, as defined by Julian Cooke et al (Julian Cooke et al, *Voyage Charters*, 3d ed (London: Informa, 2007) at p 3):

Voyage charters are those by which the owner agrees to perform one or more designated voyages in return for the payment of freight and (when appropriate) demurrage . . . .

[71] Prothonotary Morneau states in his Order, and the respondents argue, that there is nothing, in [section 46](#), that expressly excludes charter parties from the benefit of that provision.

[72] The ordinary meaning of the expression “contract for the carriage of goods by water” could support the inclusion of charter parties in [section 46](#) of the [Marine Liability Act](#).

### Scheme of the [Act](#)



[73] However, the appellant relies in part on a comparison of [section 46](#) of the *Act* with article 21 of the *Hamburg Rules*, which are included as a schedule to the *Act*. It is clear that schedules to an *Act* are considered internal to that *Act* and can be looked at and relied upon for statutory interpretation purposes (Ruth Sullivan, above, at p 403).

[74] There is a distinction; however, that needs to be made between scheduled material which is part of the enactment, scheduled material not made part of the enactment, and scheduled material set out for convenience only. In the first case, the material is interpreted as an integral part of the enactment and has the same force as the remainder of the legislation. In the third case, the material is not part of the enactment and the legal effect is “exactly the same as it would be if the materials is [*sic*] not included in the Schedule.” (Ruth Sullivan, above, at p 403-406)

[75] Thus, the *Hague-Visby Rules*, which, pursuant to section 43 (stating that these rules have the force of law in Canada), are of the first type of scheduled material, can be considered as part of the *Act*. The *Hamburg Rules*, however, are not yet in force in Canada (in fact, Canada has not even signed the 1978 Convention (United Nations Convention on the Carriage of Goods by Sea, 1978) (See

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html)), and as a consequence, the schedule can be considered as being of the third type described above. In essence, they are non-existent in terms of legal effect. Yet they are nonetheless indicative of the contents of future legislation, should they ever be proclaimed in force. The schedule containing the *Hamburg Rules* is, for interpretation purposes, external to the *Act*. [Section 46](#) has been enacted and its wording adheres very closely to article 21 of the *Hamburg Rules*. The Court cannot rely on the remainder of the *Hamburg Rules*, which are external to the *Act*, to interpret [section 46](#), nor can it ignore the fact that the wording of [section 46](#) is taken directly from article 21 of the *Hamburg Rules*.

[76] Both the *Hague-Visby Rules* and the *Hamburg Rules* exclude charter parties, the only exception being with regard to bills of lading issued to third parties pursuant to a charter party (i.e., to parties other than the two parties who entered into the charter party) (See William Tetley, *Marine Cargo Claims*, 4th ed. (Cowansville, Que: Les Éditions Yvon Blais, 2008), at p 25). Such a case does not present itself in this instance since the bills of lading stayed in the hands of COSIPA, the charterer, rather than being passed on to a third party. Thus, and as previously stated, the bills of lading acted as mere receipts.

[77] The *Hague-Visby Rules* (Schedule 3 to the *Marine Liability Act*) state:

**Article I(b)** “contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

**Article V . . .** The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. .

. . [Emphasis added.]

[78] The *Hamburg Rules* (Schedule 4 to the *Marine Liability Act*) state:  
Article 2(3) The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer. [Emphasis added.]

[79] As Professor William Tetley notes in *Marine Cargo Claims*, 4th ed.:  
 The *Hamburg Rules* add little to the Hague/Visby Rules in respect to charterparties. Art. 2(3) of the *Hamburg Rules* is to the same effect as art. 5 and art. 1(b) of the Hague/Visby Rules but is perhaps clearer.  
 [p 91; footnotes removed]

[80] [Section 46](#) also states that it includes contracts to which the *Hamburg Rules* do not apply, but the *Hague-Visby Rules* are not excluded. It is our opinion that the scheme of the *Act*, including the incorporation of the *Hague-Visby Rules*, strongly suggests that the expression “contract for the carriage of goods” in [section 46](#) is meant only to apply to charter parties where there is a:

. . . bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. [*Hague-Visby Rules*, art. 1(b)]

[81] In this case, although bills of lading exist, as we have discussed, they do not regulate the relations between the carrier (defendants) and the holder of the bills of lading (COSIPA); their relationship is governed by the charter party, as amended by the LOI. Accordingly, on this reading, [section 46](#) is not applicable.

### Object of the *Act*

[82] The object of the *Marine Liability Act* was to consolidate existing marine liability regimes, as prior to its enactment there existed several instruments relating to marine liability (Legislative Summary - Bill S-2: *Marine Liability Act*, LS-377E, February 5, 2001; appellant’s Book of Authorities):

Bill S-2 would consolidate existing marine liability regimes (Fatal Accidents; Limitation of Liability for Maritime Claims; Liability for Carriage of Goods by Water; Liability and Compensation for Pollution Damage) into a single piece of legislation which would also include new regimes concerning shipowners’ liability to passengers and apportionment of liability applicable to torts governed by Canadian maritime law. In addition, the bill would retroactively validate certain by-laws made under the *Canada Ports Corporation Act* and certain regulations made under the *Pilotage Act*. The validating provisions are of a strictly house-keeping nature and are unrelated to the marine liability regimes set out in the bill.

[83] The object of [section 46](#), according to the legislative summary prepared by the Library of Parliament was to introduce:

E. Part 5 – Liability for Carriage of Goods by Water (clauses 41-46)  
 The *Carriage of Goods by Water Act* applies to all international carriage of goods between Canada and other countries which give the force of law to the Hague-Visby Rules embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on 25 August 1924 and its Protocols of 1968 and 1979. The Act also applies to the domestic carriage of goods by water, but with some modifications. The Act provides for the eventual replacement of the Hague-Visby Rules with the Hamburg Rules, which are embodied in the United Nations Convention of the Carriage of Goods by Sea, 1978, concluded at Hamburg on 31 March 1978. Both of the Conventions apply to maritime claims for loss or damage to cargo and their key elements are basis of liability; limitation of liability; and shipowners' defences. According to departmental sources, the fact that the Hague-Visby Rules, unlike the Hamburg Rules, contain no jurisdiction clause has given rise to some problems where the inclusion of foreign jurisdiction clauses in bills of lading has prevented adjudication or arbitration of any dispute in Canada. Accordingly, an amendment is needed to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts.

Part 5 of Bill S-2 would re-enact existing provisions of the *Carriage of Goods by Water Act* respecting the application of the Hague-Visby Rules in Canada (reproduced in Schedule 3 to the bill) and the eventual implementation of the Hamburg Rules (reproduced in Schedule 4 to the bill). The Hamburg Rules would come into force only by an Order of the Governor in Council to bring clause 45 of the bill into effect (clause 131(2)), after which, according to clause 43(4) of the bill, the Hague-Visby rules would no longer apply. However, a new provision, not contained in the Hague-Visby Rules, would be introduced to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts. According to clause 46(1), if a contract for the carriage of goods by water to which the Hamburg Rules did not apply were to provide for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant could nevertheless institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada; such court or tribunal would have to be competent to determine the claim if the contract had referred the claim to Canada. This would apply where the actual or intended port of loading or discharge under the contract was in Canada; where the person against whom the claim was made resided or had a place of business, branch or agency in Canada; or where the contract was made in Canada. Clause 46(2) stipulates that, notwithstanding clause 46(1), the parties to a contract

referred to in the latter sub-clause could, after a claim arose under the contract, designate by agreement the place where judicial or arbitral proceedings could be instituted.

[84] This is clearly not the case in this matter, since the reference to a foreign forum is found directly in the charter party, negotiated freely by the parties.

[85] The position of the respondents that the transitional provision that is [section 46](#) should be given a broader interpretation than the Rules that it will eventually replace is not logical and diminishes the weight the Court assigns to their position founded on section 12 of the *Interpretation Act*.

[86] The respondents argue that the Court should consider the fact that the *Interpretation Act* stresses the remedial purpose of legislation. Section 12 of the *Interpretation Act* reads as follows:

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[87] [Section 46](#) being a transitional provision, applicable until the *Hamburg Rules* are adopted, it is difficult to subscribe to an interpretation so broad that the transitional provision will grant more rights than the *Hamburg Rules* confer.

[88] In light of this remedial interpretation, the object of the provision, namely, to confirm Canadian jurisdiction for shippers and receivers, must also be considered and must be weighed against Parliament's intention.

### **Parliament's intention**

[89] As the appellant makes clear in its submissions, the intention of Parliament in enacting [section 46](#) was to put in place a jurisdiction provision similar to article 21 of the *Hamburg Rules*. The transcript of the evidence given before the Standing Committee on Transport and Government Operations (March 27, 2001) and the Legislative Summary of Bill S-2, the [Marine Liability Act](#), amply support this contention, but they also make clear that the specific intention was to import into the [Marine Liability Act](#) and the *Hague-Visby Rules* a "desirable" jurisdictional feature of the *Hamburg Rules*, as follows:

Given the topic this morning, I would like to turn to the question of the jurisdiction clause in part 5, and that's clause 46 of Bill S-2. I'll skip over the other things, but I would be quite willing to comment on them if you'd like. Suffice it to say we do support the whole bill.

The CMLA strongly supports the adoption of the jurisdiction clause set out in clause 46 of Bill S-2. In a way, it reflects the provisions of articles 21 and 22 of the Hamburg Rules, which, as you know, are already part of our law, since they're already a schedule to our existing Carriage of Goods by Water Act. They just haven't been

proclaimed in force.

...

Furthermore, and perhaps most importantly, the Comité, the CMI, is actively reviewing issues relating to the carriage of goods by sea. There is substantial agreement within the CMI that the provisions of articles 21 and 22 of the Hamburg Rules should be incorporated in any new convention on carriage of goods by sea.” [Book of Authorities of the appellant, Tab 30, p. 26, comment by Mr. James Gould, President, Canadian Maritime Law Association.]

... However, a new provision, not contained in the *Hague-Visby Rules*, would be introduced to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts. According to clause 46(1), if a contract for the carriage of goods by water to which the *Hamburg Rules* did not apply were to provide for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant could nevertheless institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada; such court or tribunal would have to be competent to determine the claim if the contract had referred the claim to Canada. This would apply where the actual or intended port of loading or discharge under the contract was in Canada; where the person against whom the claim was made resided or had a place of business, branch or agency in Canada; or where the contract was made in Canada. Clause 46(2) stipulates that, notwithstanding clause 46(1), the parties to a contract referred to in the latter sub-clause could, after a claim arose under the contract, designate by agreement the place where judicial or arbitral proceedings could be instituted. [Book of Authorities of the appellant, Tab 32, Legislative Summary LS-377E, section E]

[90] Although, as the appellant argues, the intention was to permit the transition to the *Hamburg Rules*, the Rules are not yet in force (neither is section 45). Thus, it is reasonable to consider that the intent of Parliament was to add to the *Act* and the *Hague-Visby Rules* only [section 46](#).

[91] As previously noted, the *Hague-Visby Rules* also do not include charter parties, unless a bill of lading has been issued regulating the relationship between the carrier and the holder, which is not the case in this instance, as the bill remained with the charterer.

[92] That said, Prothonotary Morneau concluded that:

... if Parliament had wanted to clearly exclude charter parties from subsection 46(1), it would have, at some point in time, included in the MLA a provision similar to Article 2(3) of the *Hamburg Rules*, especially since these rules are still not in force in Canada. [para 37]



[93] The Court does not agree with this reasoning because, when [section 46](#) was enacted by Parliament, clearly the intent was for that section to act as a transitional provision, knowing that the *Hamburg Rules* would eventually come into force and replace [section 46](#). There was, therefore, no need to enact a provision similar to [article 2\(3\)](#) to specifically exclude charter parties, because the intent was that they be excluded. The *Hague-Visby Rules*, in article 1(b) defining a contract of carriage, excludes charter parties from the application of those rules. It would therefore have been redundant to add a provision similar to [article 2\(3\)](#).

## International obligations

[94] The Supreme Court of Canada has held on numerous occasions that Parliament and provincial legislatures are presumed to enact legislation that is consistent with international law generally and with Canada's international obligations. On different occasions, that court has held that it is reasonable for a tribunal to examine a domestic law in the context of an international agreement in order to clarify any uncertainty (*National Corn Growers Assn v Canada (Import Tribunal)*, [1990 CanLII 49 \(SCC\)](#), [1990] 2 SCR 1324 (QL) at para 74; also *Daniels v White*, 1968 SCR 517, *GreCon Dimter Inc v J.R. Normand Inc*, [2005 SCC 46 \(CanLII\)](#), 2005 SCC 46, [2005] 2 SCR 401 at para 41, and *R v Sharpe*, [2001 SCC 2 \(CanLII\)](#), [2001] 1 SCR 45 at para 175 and 176).

[95] The appellant submits that any doubt should be resolved in favour of upholding Canada's support for international arbitration agreements, pursuant to the *New York Convention* (Text available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)).

[96] The Court concludes that Canada's being aware of its international obligations when [section 46](#) was enacted is an element further supporting the view that [section 46](#) must be assigned a narrow interpretation rather than a broad one that runs counter to the enforcement of the right of the parties to a charter party to choose their forum.

## VI CONCLUSION

[97] In conclusion, the Court weighs the factors relating to the interpretation of [section 46](#) as follows. It is clear that the *Hague-Visby Rules* are part of the *Act* and in force in Canada and that they stipulate that charter parties are excluded except in the specific circumstances discussed above. Moreover, the *Hamburg Rules*, which exclude charter parties, although not in force, were also in the minds of the drafters of Part V of the *Act*. An interpretation based on the ordinary meaning of the terms "contract for the carriage of goods" in [section 46](#) leads to the exclusion of charter parties, primarily because they are excluded in the *Hague-Visby Rules*, which are incorporated into the *Act* and also because it is not logical to assign to a transitional disposition a broader and different interpretation than that given to the international convention that it will eventually replace, particularly when that convention is appended as a schedule to the *Act*.

Finally, it has been recognized that the courts can turn to international treaties to interpret domestic legislation. The Court finds that the cumulative effect of these factors weighs in favour of an interpretation of “contract for carriage of goods” in [section 46](#) of the *Act* that excludes charter parties.

[98] Having found that the respondents cannot avail themselves of the right granted under [section 46](#) of the *Marine Liability Act*, the issue of Brazil being a more appropriate forum or not is therefore moot.

### **ORDER**

#### **THIS COURT ORDERS that**

1. The appeal is allowed.
2. The Order issued by Prothonotary R. Morneau on March 10, 2011 is set aside.
3. The defendants’-respondents’ third party claims in actions T-1613-08 and T-2020-08 are stayed pending the conclusion of arbitration in New York under clause 19(b) of the Gencon charter party.
4. One set of costs of \$10,990 is awarded against the defendants-respondents.

"André F.J. Scott"

\_\_\_\_\_  
Judge

### **ANNEX**

• *Federal Courts Act*, RSC 1985, c F-7

Stay of proceedings authorized

Suspension d’instance

**50.** (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

**50.** (1) La Cour d’appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

a) au motif que la demande est en instance devant un autre tribunal;

(b) where for any other reason it is in the interest of justice that the proceedings

b) lorsque, pour quelque autre raison, l’intérêt de la justice l’exige.

be stayed.

- *Marine Liability Act*, SC 2001, c 6

**PART 5**  
**LIABILITY FOR**  
**CARRIAGE OF GOODS**  
**BY WATER**

Interpretation

Definitions

**41.** The definitions in this section apply in this Part.

“Hague-Visby Rules”  
« règles de La Haye-Visby »  
“Hague-Visby Rules” means the rules set out in Schedule 3 and embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on August 25, 1924, in the Protocol concluded at Brussels on February 23, 1968, and in the additional Protocol concluded at Brussels on December 21, 1979.

“Hamburg Rules”  
« règles de Hambourg »  
“Hamburg Rules” means the rules set out in Schedule 4 and embodied in the United Nations Convention on the Carriage of Goods by Sea, 1978, concluded at Hamburg on March 31, 1978.

...

**PARTIE 5**  
**RESPONSABILITÉ EN**  
**MATIÈRE DE**  
**TRANSPORT DE**  
**MARCHANDISES PAR**  
**EAU**

Définitions et disposition interprétative

Définitions

**41.** Les définitions qui suivent s’appliquent à la présente partie.

« règles de Hambourg »  
“Hamburg Rules”  
« règles de Hambourg » Les règles figurant à l’annexe 4 et faisant partie de la Convention des Nations Unies sur le transport de marchandises par mer, 1978, conclue à Hambourg le 31 mars 1978.

« règles de La Haye-Visby »  
“Hague-Visby Rules”  
« règles de La Haye-Visby » Les règles figurant à l’annexe 3 et faisant partie de la Convention internationale pour l’unification de certaines règles en matière de connaissance, conclue à Bruxelles le 25 août 1924, du protocole de Bruxelles conclu le 23 février 1968 et du protocole supplémentaire de Bruxelles conclu le 21 décembre 1979.

[...]



## Hague-Visby Rules

## Règles de La Haye-Visby

## Effect

## Force de loi

**43.** (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.

**43.** (1) Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article X de ces règles.

## Extended application

## Application étendue

(2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply.

(2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.

## Meaning of "Contracting State"

## Définition de « État contractant »

(3) For the purposes of this section, the expression "Contracting State" in Article X of the Hague-Visby Rules includes Canada and any state that, without being a Contracting State, gives the force of law to the rules embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on August 25, 1924

(3) Pour l'application du présent article, « État contractant », à l'article X des règles de La Haye-Visby, vise, outre le Canada, tout État qui, n'étant pas lui-même un État contractant, donne force de loi à ces règles, qu'il donne ou non force de loi au protocole supplémentaire de Bruxelles conclu le 21 décembre 1979.

and in the Protocol concluded at Brussels on February 23, 1968, regardless of whether that state gives the force of law to the additional Protocol concluded at Brussels on December 21, 1979.

Replacement by Hamburg Rules

(4) The Hague-Visby Rules do not apply in respect of contracts entered into after the coming into force of section 45.

Hamburg Rules  
Report to Parliament

**44.** The Minister shall, before January 1, 2005 and every five years afterwards, consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules and cause a report setting out the results of that consideration to be laid before each House of Parliament.

*[Section 45 not yet in force.]*

Effect

**45.** (1) The Hamburg Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules.

Extended application

(2) The Hamburg Rules also apply in respect of

Remplacement par les règles de Hambourg

(4) Ne sont pas assujettis aux règles de La Haye-Visby les contrats conclus après l'entrée en vigueur de l'article 45.

Règles de Hambourg  
Rapport au Parlement

**44.** Avant le 1<sup>er</sup> janvier 2005, et par la suite tous les cinq ans, le ministre examine la possibilité de remplacer les règles de La Haye-Visby par celles de Hambourg et fait déposer un rapport sur ses conclusions devant chaque chambre du Parlement.

Force de loi

**45.** (1) Les règles de Hambourg ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article 2 de ces règles.

Application étendue

(2) Les règles de Hambourg s'appliquent

contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless the contract stipulates that those Rules do not apply.

également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils stipulent que les règles ne s'appliquent pas.

Meaning of "Contracting State"

Définition de « État contractant »

(3) For the purposes of this section, the expression "Contracting State" in Article 2 of the Hamburg Rules includes Canada and any state that gives the force of law to those Rules without being a Contracting State to the United Nations

(3) Pour l'application du présent article, « État contractant », à l'article 2 des règles de Hambourg, vise, outre le Canada, tout État qui, n'étant pas lui-même un État contractant de la Convention des Nations Unies sur le transport de marchandises par

Convention on the Carriage of Goods by Sea, 1978.

mer, 1978, donne force de loi à ces règles.

References to "sea"

Mention de « mer »

(4) For the purposes of this section, the word "sea" in the Hamburg Rules shall be read as "water".

(4) Pour l'application du présent article, la mention de « mer » dans les règles de Hambourg vaut mention de « eau ».

Signatures

Signature

(5) For the purposes of this section, paragraph 3 of article 14 of the Hamburg Rules applies in respect of the documents referred to in article 18 of those Rules.

(5) Pour l'application du présent article, le paragraphe 3 de l'article 14 des règles de Hambourg s'applique aux documents visés à leur article 18.

Institution of Proceedings in Canada  
Claims not subject to Hamburg Rules

Procédure intentée au Canada  
Créances non assujetties aux règles de Hambourg

**46.** (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

**46.** (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :

(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;

(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;

(c) the contract was made in Canada.

c) le contrat a été conclu au Canada.

Agreement to designate

Accord

(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.

(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.

- *UN Convention on the Carriage of Goods By Sea, 1978 (Hamburg Rules)* attached as Schedule 4 to the *Marine Liability Act*

## Article 2.

## Scope of application

...

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

## Article 21

## Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant;  
or

## Article 2.

## Champ d'application

[...]

3. Les dispositions de la présente Convention ne s'appliquent pas aux contrats d'affrètement. Toutefois, lorsqu'un connaissement est émis en vertu d'un contrat d'affrètement, il est soumis aux dispositions de la présente Convention pour autant qu'il régit les relations entre le

transporteur et le porteur du connaissement, si ce dernier n'est pas l'affréteur.

## Article 21

## Compétence

1. Dans tout litige relatif au transport de marchandises en vertu de la présente Convention, le demandeur peut, à son choix, intenter une action devant un tribunal qui est compétent au regard de la loi de l'Etat dans lequel ce tribunal est situé et dans le ressort duquel se trouve l'un des lieux ou ports ci-après :

a) l'établissement principal du défendeur ou, à défaut, sa résidence habituelle;

<i>(b)</i> the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or	<i>b)</i> le lieu où le contrat a été conclu, à condition que le défendeur y ait un établissement, une succursale ou une agence par l'intermédiaire duquel le contrat a été conclu;
<i>(c)</i> the port of loading or the port of discharge; or	<i>c)</i> le port de chargement ou le port de déchargement;
<i>(d)</i> any additional place designated for that purpose in the contract of carriage by sea.	<i>d)</i> tout autre lieu désigné à cette fin dans le contrat de transport par mer.

- *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (1924) (**Hague-Visby Rules**) attached as Schedule 3 to the [Marine Liability Act](#)

## Article I

## Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,

*(a)* “carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper;

*(b)* “contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as

## Article I

## Définitions

Dans les présentes règles, les mots suivants sont employés dans le sens précis indiqué ci-dessous :

*a)* « transporteur » comprend le propriétaire du navire ou l’affréteur, partie à un contrat de transport avec un chargeur;

*b)* « contrat de transport » s’applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par eau, il s’applique

aforsaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

également au connaissance ou document similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissance;

- *Commercial Arbitration Code* attached as a schedule to the *Commercial Arbitration Act*, [RSC 1985, c 17](#)

#### Article 8

##### Arbitration Agreement and Substantive Claim before Court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made,

#### Article 8.

##### Convention d'arbitrage et actions intentées quant au fond devant un tribunal

1. Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que la convention est caduque, inopérante ou non susceptible d'être exécutée.

2. Lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence

while the issue is pending  
before the court.

peut être rendue en attendant  
que le tribunal ait statué.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1613-08

**STYLE OF CAUSE:** T. CO. METALS LLC  
v  
THE VESSEL "FEDERAL  
EMS", THE OWNERS, CHARTERERS AND ALL  
OTHERS INTERESTED IN THE VESSEL  
"FEDERAL EMS", CANADA MOON SHIPPING CO.  
LTD. and FEDNAV INTERNATIONAL LTD.  
and  
COMPANHIA SIDERURGICA PAULISTA-COSIPA

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** June 9, 2011

**REASONS FOR ORDER  
AND ORDER:** SCOTT J.

**DATED:** September 12, 2011

**APPEARANCES:**

Paul Blanchard FOR THE PLAINTIFF

David G. Colford and Vanessa Arviset FOR THE DEFENDANTS-RESPONDENTS

Jean-Marie Fontaine and Daniel Grodinsky FOR THE THIRD PARTY-APPELLANT

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by **LEXUM**  for the  Federation of Law Societies of Canada

*Case Name:*

**MacAlpine v. Progressive Conservative Party of Ontario**

**Between**

**Donald MacAlpine, plaintiff, and  
Executive Officers and Members of the Ontario Progressive  
Conservative Party and Members of the Ontario Progressive  
Conservative Party Caucus and Specific Boards and Directors of  
Corporations Named, defendants**

[2003] O.J. No. 3089

[2003] O.T.C. 709

2003 CarswellOnt 3008

124 A.C.W.S. (3d) 664

Court File No. 03-105

Ontario Superior Court of Justice

**Pierce J.**

Heard: June 19-20, 2003.

Judgment: June 25, 2003.

(42 paras.)

*Practice -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action or defence.*

Motion by the defendants, the Executive Officers and Members of the Ontario Progressive Conservative Party, the Ministers of the Crown, the Certified General Accountants of Ontario, and the Boards and Directors of certain corporations, to strike out MacAlpine's statement of claim against them for failing to disclose a reasonable cause of action. MacAlpine moved to strike out the motion and for summary judgment in his favour. MacAlpine brought an action against the defendants alleging that he had requested permits from the Ministry of Natural Resources, and that the processing of the permits was interrupted by the Public Service Employees' Strike. He also claimed that his business was affected by the neglect of duty of the politicians, accountants, lawyers and executives of certain banks and financial institutions for failing to urge the government to end the strike. MacAlpine argued that their actions were in violation of his Charter rights.

HELD: Motion by the defendants allowed. MacAlpine's motion was dismissed. This was not a mere question of drafting. The pleadings did not define any issues with clarity. The Charter did not protect economic interests and there was no evidence that MacAlpine was treated in a discriminatory manner.

There was no factual foundation supporting MacAlpine's contention that government officials acted in bad faith or abused their power. The Conservative Party was not an individual or corporation which could be sued on its own. The remaining defendants did not owe MacAlpine any duty of care. 175

### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 15(1).

Criminal Code.

Ontario Rules of Civil Procedure, Rule 21.01(1)(b), 21.01(3)(b).

Proceedings Against the Crown Act, s. 7.

### **Counsel:**

Donald MacAlpine, on his own behalf.

A. Hamilton, for the Executive Officers and Members of the Ontario Progressive Conservative Party.

D. Guttman, for Ministers of the Crown and Employees of Her Majesty, improperly referred to as "Members of the Ontario Progressive Conservative Caucus".

K. Jolley, for the Certified General Accountants of Ontario.

A. Weiss, for Brian Hunt, President and CEO and the Management and Executive Staff of the Institute of Chartered Accountants of Ontario, Gordon Nixon, President and Chief Executive Officer, and the Board of Directors of Royal Bank of Canada, W. Edmund Clark, President and CEO and the Board of Directors of T.D. Bank Head Office, Peter C. Godsoe, Chairman of the Board and CEO and the Board of Directors of Scotia Bank Head Office.

G. D'Alessandro for Bell Canada, Bell Mobility Inc. and BCE Inc.

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**1 PIERCE J.:**-- The defendants move, pursuant to Rule 21.01(1)(b), to strike the plaintiff's statement of claim on the grounds that it discloses no reasonable cause of action, and that it fails to comply with the rules of appropriate pleading.

**2** The plaintiff has filed three motions. The first claims the following relief:

"1. an order striking out the defendants' motions to March 27, 2003;

2. urgency of considerations;

3. delivery of Summary Judgement for recovery of \$2.5 million in 2002 business losses assigned per defendant named OR \$35 million per defendant, if plaintiff loses current long-term negotiations; and

4. equivalent legal costs incurred by the plaintiff to the final date of Court hearing, currently at \$35,200 per month or \$140,800 to April 14, 2003."

**3** The second motion seeks the following:

"1. Securing an order/written record censuring the conduct of lawyers named herein,

said record for delivery to a Law Society of Upper Canada (LSUC) commissioner for review of complaints from plaintiff, summarized in this document and as directed by LSUC Complaints Services Representative, R.A. Curvan in a May 20, 2003 letter (copy follows);

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2. Securing an order/written record to be provided to LSUC commissioner, assessing the conduct of LSUC in this matter in view of LSUC's web site advertising;
3. Securing an order setting aside the defendant's Notices of Motions and setting a Summary Judgement Trial date for argument of Statement of Claim and Motions Submitted by the plaintiff to date;
4. Warning to opposing Parties, and the Superior Court of Ontario, that the plaintiff considers actions encountered to date in violation of the plaintiff's right to fair and open hearings and that, if resolution to this issue is not set by June 20, 2003, an order will be sought from the Appeals Court process, moving hearing of the case to a Court outside of the jurisdiction of the Ministry of the Attorney General's Office of Ontario due to the failure for the Ontario Court system to control actions from the Attorney General's office to date and the fact that related court hearings to date were conducted in a manner and with bias that showed a complete lack of consideration of the plaintiff's rights, motions, and evidence presented to date. The plaintiff warns the Court that opposing counsel must demonstrate to him by 5:00 p.m. on June 12, 2003 that they indeed have factums that warrant this case's continuation in the Superior Court system and that the Superior Court demonstrates on June 19, 2003 that it is able to conduct itself without bias in this matter or he will move this to the Federal Minister of Justice's office and the Federal Appeals Court system on the basis that the Superior Court of Ontario cannot guarantee the plaintiff a fair hearing of his grievances. THIS ADDENDUM PROVIDES MORE CAUSE FOR APPEAL to the Notice of Opposing Motion Record of May 26, 2003;
5. If resolution to this issue is not set by June 19, 2003, a request to the relevant enforcement agencies for investigation as to the conduct of fraud by members of the business community and fraud and false advertising by the Certified General Accountants of Ontario and the Progressive Conservative Party of Ontario; and
6. If resolution to this issue is not set by June 19, 2003, a request to relevant police departments into the investigation of breach of duty of politicians, legal counsel and agents of the Attorney General's office in regards to Constitutional Law."

4 The third motion asks that:

- "1. the Defendant's Motions be denied and the issue be moved to Summary Judgment Trial;
2. Written assessment of lawyer's conduct for delivery to Law Society of Upper Canada Commissioner;
3. Written assessment of Law Society of Upper Canada's direction to the plaintiff and relevance of the Society for forwarding to the Commissioner;
4. note defendants George Cooke and Alain Batty in default."

Motions to Strike

5 Authority for the motions to strike is set out in Rule 21.01(1)(b) of the Rules of Civil Procedure.

6 For the purpose of these motions, the court must only consider the statement of claim, not affidavits in support or other material. Events after the statement of claim are issued have no relevance in law for the

purpose of these motions. The court, recognizing the plaintiff is not legally trained, has reviewed the lengthy submissions of the plaintiff in response to these motions that also touch on matters allegedly arising since the statement of claim was issued. However, the plaintiff's material has been considered only insofar as it may be characterized as a submission. The statement of claim must stand or fall on its merits. 177

7 Allegations in the statement of claim must be assumed to be true, unless they are ridiculous or incapable of proof. See *Operation Dismantle v. the Queen* [1985] 1 S.C.R. 441 (S.C.C.). The test enunciated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959; (1990), 74 D.L.R. (4th) 321 is whether it is "plain and obvious" that the material facts set out in the statement of claim disclose no reasonable cause of action. The court should be reluctant to strike a claim that is novel or which suffers merely from deficient pleading.

### The Statement of Claim

8 The claim was issued February 17, 2003. It names six classes of defendants, some of whom are "stand alone" defendants. These include the Premier of Ontario and the Minister of Natural Resources for Ontario as "Class One defendants." The balance of the Ontario Progressive Conservative Party and the Conservative Party Caucus, with their unnamed defendants, form "Class Two."

9 "Class Three" are the Certified General Accountants of Ontario and The Institute of Chartered Accountants of Ontario, together with their chief executive officers, boards of governors, management and executive staff. With the exception of the chief executive officers, the rest of the individuals in this class are unnamed.

10 "Class Four" defendants comprise the named presidents of The Dominion of Canada General Insurance Company and Royal Bank of Canada, plus their boards of directors, who are unnamed. These defendants are included because they are said to have contributed, directly or indirectly, to the Ontario Progressive Conservative Party's leadership race in March, 2002.

11 "Class Five" includes individuals and corporations alleged to have contributed to the same leadership race. The named chief executive officers of Scotiabank Head Office, Bell Canada, Bell Mobility, Bell Canada Enterprises Head Office, TD Bank Head Office and Canadian Tire Corporation Head Office, together with their unnamed boards of directors form this class.

12 Finally, "Class Six" consists of named chief executive officers of Union Gas Limited and the Canadian Division of Ingersoll-Rand Financial Services/Bobcat/Bobcat Financial, and their corporations, on the basis that they have "threatened deterioration of the plaintiff's credit and ability to conduct business."

13 The statement of claim alleges the plaintiff in February of 2002, requested permits from the Ministry of Natural Resources to remove aggregate from Crown lands. It is not pleaded the plaintiff was entitled to these permits. The plaintiff asserts that the processing of the permits was interrupted by the Public Service Employees' Strike. He states that as of February 2003, he didn't have all the permits required to conduct his business, and that he has lost income as a result.

14 As well, Mr. MacAlpine claims he was treated less favourably than another mining company in the same vicinity. It is this difference in treatment that he says gives rise to his claim for relief under ss. 7 and 15(1) of the Charter of Rights and Freedoms.

15 The summary of the claim states in part:

"The Plaintiff has been negatively impacted by the contemptuous neglect of duty and obligations assigned to elected politicians by the Constitution Act, 1982(1),

Part I, Canadian Charter of Rights and Freedoms, especially Sections 7 (Legal Rights) and 15(1) (Equality Rights), and by the self-serving and uncaring neglect of duty by other professions, individuals and businesses whose actions, direct and indirect, led the plaintiff to loss of revenues in 2002 of \$2.5 million, and, if the matter is not resolved by February 28, 2003, loss of a six year letter of intent worth a minimum of \$35 million, as well as other business opportunities. The plaintiff charges that individuals, including those in careers as politicians, lawyers, accountants, and as executives and board members of companies named, moved by March 13, 2002 to influence politicians to serve their own interests in complete disregard for the rights of the plaintiff and others entrenched in the Canadian Charter of Rights and Freedoms, and that the courts must consider the seriousness of this, given, [sic] recent references to the need to make the practice of international business free of allegations like those commonly used as reference in the media, such references to Enron and Worldcom debacles in the USA and exertion of political influences regarded as so derogatory in other nations. The plaintiff asks the courts to move rapidly and forcefully to protect Charter rights and obligations with due consideration of the events and issues put forward by the plaintiff AND to especially send a strong message to any found to not have considered their publicly stated obligations and intents to protect the public interest in manners like the plaintiff suggests. ..."

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**16** The statement of claim is a thirty-eight page document that has been described in the Attorney General's factum as:

"... a diffuse morass of facts, argument, invective, repetition, irrelevant tangents and simple nonsense."

Other defendants have described it as "nearly incomprehensible."

**17** This is not a mere question of drafting, which can be corrected by amendment. The function of pleadings is to define the issues with clarity, to give notice of the case to be met and remedies sought, and to assist the court in its investigations of truth. Pleadings are a road map for the court. See *National Trust Co. v. Furbacher* [1994] O.J. No. 2385 (Gen. Div.).

**18** Ferguson J. noted at page 224 in *Cadillac Contracting and Developments Limited v. Tanenbaum* [1954] O.W.N. 221 (H.C.J.):

"A pleading ought to be a concise statement of the facts, and not a rambling, diffused, mixed-up mass of facts, evidence, arguments and law."

Where fraud is alleged, full particulars must be pleaded. Rule 25.06(8).

This statement of claim lacks particularity in who did what to whom. Many of the defendants are not named. In some instances, there is no pleading of any nexus between a named defendant and the plaintiff, and no allegation of facts giving rise to a claim.

**19** The plaintiff seeks relief, alleging breaches of his Charter rights under sections 7 and 15. His claim is premised on the mistaken belief that the Charter protects pure economic interests. The Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 and more recently in *Siemens v. Manitoba (Attorney General)*, [2003] S.C.J. No. 69, 2003 (S.C.C.) established the principle that economic rights are not protected by s. 7 of the Charter.

**20** The plaintiff asks the court to disregard these authorities as having been arrived at on the basis of flawed reasoning. He argues that the right to life necessarily involves the right to make a living.

**21** The principle of stare decisis is a cornerstone of our law. The law derives certainty and predictability from the application of appellate principles to cases heard by courts below. Mr. MacAlpine's political grievances are not grounds to overturn this ancient principle of common law. Accordingly, it is "plain and obvious" that the plaintiff's claim cannot succeed based on invoking s. 7 of the Charter to redress economic loss.

**22** In order to succeed in claiming relief under s. 15(1) of the Charter, Mr. MacAlpine must prove he has been treated in a manner that is different under one or more of the enumerated or analogous grounds and that he has been deprived of his human dignity. See *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 at page 13; *Law v. Canada (Minister of Employment and Immigration)*, (1999), 170 D.L.R. (4th) 1 at 38, (S.C.C.). No such ground has been pleaded. It is "plain and obvious" that the plaintiff cannot succeed in his prayer for Charter relief under s. 15(1).

**23** There is no factual foundation pleaded to support a contention that government officials acted in bad faith or abused their powers. Therefore, even if a Charter breach were proven, it is unlikely damages would be awarded, based on current jurisprudence. See *Mackin v. New Brunswick (Minister of Finance)*, (2002), 209 D.L.R. (4th), 564 at para. 79 (S.C.C.); *Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 at para. 48-49 (Ont. Div. Ct.); and *Anton (Guardian as litem of) v. British Columbia (Minister of Health)*, (2001), 197 D.L.R. (4th) 165 at 185 (B.C.S.C.), varied (2002) 6 B.C.L.R. (4th), 201 (B.C.C.A.).

**24** The plaintiff complains the government failed to intervene soon enough in the strike by the Ontario Public Service Employees, causing him financial hardship. The difficulty with this submission is that he asks the court to review a policy decision of government. It is the prerogative of the elected Legislature to make policy decisions in governing. While it is the function of the courts to apply the law, historically, matters of policy are determined by the elected Legislature. The courts afford such policy-making deference. There is no liability for the exercise of policy-making. See *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 at 206 (S.C.C.); *Delorme v. South Nation River Conservation* (1998), 18 C.P.C. (4th) 55 at 64 (Gen. Div.).

**25** If the plaintiff intended to sue Her Majesty the Queen in Right of Ontario, he is required to give at least 60 days notice of the claim before the commencement of the action, pursuant to s. 7 of the Proceedings Against the Crown Act. There is no discretion in the court to waive the notice provision. No notice was provided in the case at bar. This is a condition precedent to the action, rendering the claim a nullity against the Crown.

**26** The claim is brought against the members of the Ontario Progressive Conservative Party caucus and the balance of the Ontario Progressive Conservative Party. The individual members are not named. Even if the claim were tenable, it would be impossible to know against whom judgment would lie, let alone against whom it could be enforced.

**27** In order to sue at common law, the defendant must be either an individual or a corporation. A caucus and a political party are neither.

**28** The plaintiff submits that political parties accept donations, control money, and are represented by a president; therefore they should be held accountable for their actions.

**29** In *Zundel v. Liberal Party of Canada* [1999] O.J. No. 74, (Ont. Sup. Ct.), Chadwick J. at paragraph 11 commented,

"It is common ground by counsel for all of the political parties that the political parties have no assets, hold no real estate, employ no people, and as such are not a legal entity. I agree with their position and on that basis I would dismiss the claim as against the political parties."

**30** A similar approach was taken by Epstein J. in *Galati v. McGuinty* [1999] O.J. No. 2171 (Ont. Sup. Ct.). At paragraph 20, she observed:

"... The Ontario Liberal Party is not a government actor. It is a private unincorporated association. Its objects may be political in nature, but that is insufficient to drape it with the cloak of government authority."

**31** Rule 21.01(3)(b) of the Rules of Civil Procedure permits a defendant to move for an order staying or dismissing an action if the defendant does not have the legal capacity to be sued. Such is the case here. It is "plain and obvious" the plaintiff cannot succeed against the Ontario Progressive Conservative Party and members of the Conservative Caucus. The plaintiff confuses the provincial government with the provincial Progressive Conservative Party.

**32** The Certified General Accountants of Ontario and the Institute of Chartered Accountants of Ontario make similar submissions. First: the plaintiff's claim against them is derivative in nature. He must first demonstrate his rights under the Charter have been breached, and that he is entitled to relief as a result. Should he fail, then the derivative claims must also fail.

**33** Second, there is no duty of care between these defendants and the plaintiff.

**34** Mr. MacAlpine submits the accountants were under a professional duty to urge the government to end the Ontario Public Service strike. As well, he contends that as contributors to the Ontario Progressive Conservative party, they sought to exert influence on the government for an improper purpose, which is not specified.

**35** It is forcefully argued by the accountants that donation to a political party is lawful, and an exercise of one's individual or collective democratic rights. Great exception is taken to Mr. MacAlpine's submission that political donations by the accountants' governing bodies constitute influence peddling within the meaning of the Criminal Code.

**36** The accountants' counsel also contend Mr. MacAlpine alleged no relationship between the accounting associations and the plaintiff; nor does he state the accounting bodies knew him and knew he had an issue with government. It is not pleaded Mr. MacAlpine was entitled to a permit, or that the accountants knew he applied for one. There is no pleading of reliance on these defendants, or that the plaintiff had any reasonable expectations concerning the accounting bodies named. In short, it is argued they had no connection to the plaintiff and owed him no duty of care.

**37** I agree with these submissions. The plaintiff is in no different position vis-à-vis the accounting bodies than any other member of the population. Were it not so, these defendants would be subject to indeterminate liability for indeterminate amounts for an indeterminate class. See *Hughes v. Sunbeam Corp. (Canada) Ltd.* 61 O.R. (3d) 433; [2002] O.J. No. 3457 (Ont. C.A.); and *Edwards v. Law Society of Upper Canada*, 2001 S.C.C. 80, (S.C.C.). There is no relationship of proximity between the plaintiff and these defendants to ground a private law duty of care.

**38** The plaintiff has sued the defendants in what he describes as "Class Four" and "Class Five" on the basis that they contributed to the Ontario Progressive Conservative Party's leadership race, directly or



indirectly. The plaintiff claims, without alleging any facts, that these defendants must ensure their donations were not self-serving. It is difficult to understand what the plaintiff means by this pleading. He appears to seek an indictment of the Ontario Progressive Conservatives and the government of Premier Eves by laying the blame at the feet of these companies for failing to control the Eves government and the Ontario Progressive Conservative Party. This is not a cause of action known to law. 181

**39** The "Class Six" defendants are alleged to have "threatened deterioration of the plaintiff's credit and ability to conduct business." No particulars are pleaded. It is impossible to know whether a breach of contract, or the tort of intentional interference in business relations is alleged, or whether these are the legitimate attempts of creditors to have their accounts paid.

**40** For all of these reasons, the statement of claim does not disclose a reasonable cause of action. Order to go striking the statement of claim.

**41** Counsel presented their arguments in a competent and professional manner. As a result of the foregoing reasons, the plaintiff's motions are dismissed.

**42** If demanded, the defendants may make written submissions with respect to costs within thirty days. The plaintiff may respond to the defendants' submissions within 15 days thereafter. PIERCE J.

cp/e/nc/qw/qlgkw/qlkjg/qltl/qlxr

Soulos v. Korkontzilas,  
Korkontzilas and Olympia Town Real Estate Ltd.

Indexed as: Soulos v. Korkontzilas  
(H.C.J.)

74 O.R. (2d) 766  
[1990] O.J. No. 1594  
Action No. 24630/87

ONTARIO  
High Court of Justice  
Steele J.  
September 5, 1990.

1990 CanLII 6751 (ON SC)

Civil procedure -- Pleadings -- Amendment -- Plaintiff claiming damages in statement of claim and then refusing to answer questions on discovery relating to damages and mitigation -- Order for re-attendance to answer questions granted -- Plaintiff moving to amend statement of claim to delete claim for damages -- Master dismissing motion -- Plaintiff's appeal allowed and leave to amend granted -- Rule 48.04 not taking precedence over rule 26.01 -- Rules of Civil Procedure, O. Reg. 560/84, rules 26.01, 48.04.

The plaintiff was suing the defendants for a declaration that the defendants, who he claimed had acted as his exclusive agents in locating certain property, had breached their fiduciary duty in purchasing the property after the vendor turned down the plaintiff's initial offer and that the defendants consequently held the property in trust for him. He also claimed damages for breach of contract, breach of agency and breach of trust. At his examination for discovery, the plaintiff objected to answering certain questions dealing with damages incurred by him and mitigation. He was ordered to re-attend to answer the questions. He brought a motion for an

order to amend the statement of claim by deleting the claim for damages. The master dismissed the motion, ruling that once orders have been made requiring questions to be answered on an examination for discovery, it is an abuse of process to seek to amend the pleadings to avoid answering such questions. The plaintiff appealed.

Held, the appeal should be allowed; the amendment should be permitted.

Most of the questions ordered to be answered related to the issue of damages which, if the statement of claim was amended to remove the claim for damages entirely, would be moot. Rule 26.01 is mandatory and the only discretion left to the court is whether prejudice will result that could not be compensated for by costs or an adjournment. There would be no prejudice to the defendant if the amendment were permitted. The amendment would narrow the issues before the court and shorten both the examinations for discovery and the length of the trial.

Rule 48.04 does not take precedence over rule 26.01. A plaintiff may withdraw any major part of his claim before or at trial under rule 26.01. A general claim for damages is not a statement of fact and does not constitute an admission; leave is not required in order for it to be withdrawn. Even if it was an admission, rule 26.01 supersedes rule 48.04.

Statutes referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 112

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rule 26, rules 1.04(1), 26.01, 48.04 [am. O. Regs. 478/85, s. 1; 323/86, s. 1]

APPEAL from a master's order dismissing a motion to amend a statement of claim.

Brian P. Bellmore, for appellant.

Lucia Fauret, for respondents.

STEELE J.:-- This is an appeal from the order of Master Peterson by which he refused to permit the plaintiff to amend his statement of claim. In the action, the plaintiff claimed for a declaration that the defendants, Fotios Korkontzilas and Panagiota Korkontzilas hold title to 730 Danforth Avenue in trust for him, and requiring them to transfer the title to the plaintiff, and, under para. 3 of the statement of claim, for an accounting of rentals and income generated therefrom, and under para. 1(g), such further and other relief as the court may deem just. In addition, the plaintiff claimed as follows:

1. (d) damages for breach of contract, breach of agency, and breach of trust in the amount of \$500,000 ...

The action arises out of facts surrounding the relationship between the plaintiff and the defendants with respect to the above referred-to lands. The plaintiff has alleged that the defendants acted as his exclusive agent in locating and presenting to him, and then, on his behalf, to the owners of properties, properties in the Danforth Avenue area. The plaintiff alleges that, during the course of this exclusive relationship, the defendants appropriated 730 Danforth Avenue, on which the plaintiff had submitted an offer. The defendants deny that they ever acted as exclusive agents.

With respect to the dealings relating to 730 Danforth Avenue, the respective pleadings allege different facts. The plaintiff alleges that he made an offer which was not accepted by the vendor, and the defendants discouraged him from pursuing the matter further. The defendants' position is that the plaintiff's offer was rejected by the vendor and that the plaintiff, having been told this, indicated that he would pay no more and that he was no longer interested, and that the defendants themselves could buy the property if they wished. It is admitted that the defendants, Fotios and Panagiota did, in

fact, purchase the property.

Examinations for discovery of the plaintiff have been held over a total period of four days, and certain questions were asked which were refused, the majority of which dealt with damages incurred by the plaintiff and with mitigation thereof. The defendants have requested a further three days of examination to answer those questions. Prior to the continued examination for discovery in March of 1989, the defendants brought a motion requiring the plaintiff to re-attend to answer proper questions and to amend its statement of defence. That motion was heard on February 21, 1989, at which time it was ordered that any transactions not involving the defendants were not relevant to the action, and only dealings between the parties relating to 730 Danforth Avenue were relevant. As a result of this, the plaintiff refused to answer the questions on March 6, 1989. On March 8 the master settled his order and determined that the defendants would be entitled to complete their examination of the plaintiff, including their examination with respect to the amendment to the statement of defence. On September 5, 1989, the defendants brought a motion requiring the plaintiff to answer questions which were asked and refused in May of 1988 and March of 1989.

On March 29, 1990, two weeks before the plaintiff was scheduled to re-attend to answer questions pursuant to the master's order, the plaintiff brought a motion for an order to amend the statement of claim by deleting para. 1(d) thereof. In his reasons, Master Peterson granted leave under the Rules of Civil Procedure, O. Reg. 560/84, rule 48.04 [am. O. Regs. 478/85, s. 1; 323/86, s. 1] to bring the motion, stating that rule 48.04 does not exempt Rule 26 once that action has been set down. Further in his reasons, he dismissed the motion without prejudice to it being brought back on on completion of the discoveries if so advised. He was of the opinion that once orders had been made requiring questions to be answered on an examination for discovery, it is an abuse of process to seek to amend the pleadings to avoid answering such questions. He felt that an order requiring questions to be answered was a determination they they were proper questions at the time they were ordered and that it would create procedural mischief if

parties could amend pleadings to avoid answering such questions, and that at the end of the day the trial judge could compensate in costs for any improper conduct.

With respect, I disagree in part with the master's reasoning. Most of the questions ordered to be answered in the earlier order relate to the issue of damages and mitigation which, if the statement of claim is amended to remove the claim for damages entirely, will be moot because the issue of damages would no longer be before the court. In my opinion, rule 26.01 is mandatory and the only discretion left to the court is whether prejudice will result that could not be compensated for by costs or an adjournment. The burden of proving prejudice lies with the party opposing the amendment.

The master did not make any finding of prejudice because he dealt with it as an abuse of process.

In my opinion, there would be no prejudice to the defendant if the amendment were granted. The proposed amendment would relieve the defendants from defending an action for damages and would enable them to confine their defence to the remaining issue of whether a fiduciary relationship was owed to the plaintiff by the defendants, and whether that obligation had been breached. The amendment would narrow the issues before the court and shorten both the examinations for discovery and the length of trial. This would ensure a more expeditious and less expensive action in conformity with rule 1.04(1) of the Rules of Civil Procedure. Further, no prejudice to the defendants would result from the proposed amendment because if the plaintiff is not successful in obtaining the relief sought as a result of the amendment, he would be barred in future from seeking damages based on his cause of action. In any event, the plaintiff has undertaken to the court that he will make no claim for damages other than the accounting, and that he will not claim damages under paras. 1(e) or (g) of the statement of claim, or the inherent relief given to the court under s. 112 of the Courts of Justice Act, 1984, S.O. 1984, c. 11.

I do not agree with the master that rule 48.04 takes precedence over rule 26.01. A party has the conduct of his own

action, and if he wishes to withdraw a major segment of that cause of action he has the right to do so and should not be forced to pursue a claim that he no longer wishes to make. In my opinion, a plaintiff may withdraw any major part of his claim before or at trial under rule 26.01, and an order must be granted in accordance with that rule. There may be instances in which an amendment to the pleadings could constitute an abuse of process of the court, but I do not see the present case as one of them.

Discoveries must relate to the pleadings. Therefore, any questions on discoveries that do not are improper. It was an error for the master to have ordered that discoveries continue without prejudice to bringing back this very motion to delete the claim for damages. The issue of what the pleadings are should be determined no matter at what stage they may be in the discoveries. It could well be that, as a result of discoveries, a party concludes that there is no merit in a particular claim and therefore he should be allowed to drop it without continuing discoveries as if the claim had not been dropped. To insist that a party continue to be examined on issues that he no longer considers to be relevant is exposing him to questions that do not relate to the cause of action. The plaintiff is the party who has the choice of what the cause of action will be.

A general claim for damages is not a statement of fact and does not constitute an admission and, in my opinion, does not require leave in order for it to be withdrawn. Even if it was an admission, rule 26.01 supersedes rule 48.02. If there is prejudice, then the amendment to the pleadings should be refused, but here there is no prejudice. The Rules of Civil Procedure should be interpreted to ensure the most just, expeditious and least expensive determination of an action on its merits. It would be contrary to the philosophy of the rules, and to the common law, to deny the plaintiff the right to define the scope of his action and select the remedy most appropriate for his cause of action. The pleadings should be narrowed at any stage of the proceedings, if possible, even at trial. This does not mean that the party amending his pleadings is not subject to a penalty in costs for any damages that have been incurred as a result.

An order will issue setting aside the order of Master Peterson, dated April 19, 1990, and an order will issue amending the statement of claim by deleting para. 1(d). The defendants are entitled to all costs thrown away as a result of the amendment to the pleadings. The plaintiff is entitled to the costs of this appeal in the cause.

Appeal allowed.



**CITATION:** Thode v. University of Ottawa, 2012 ONSC 7284

**COURT FILE NO.:** CV-11-52841

**DATE:** 2012/12/20

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Jordan Luc Thode

Plaintiff/Respondent

– and –

University of Ottawa and Gillian McLellan

Defendants/Moving Parties

Phillip Trotter, for the Plaintiff/Responding  
Party

Stephanie Drisdelle, for the Defendants/  
Moving Parties

**HEARD:** December 13, 2012

**REASONS FOR DECISION ON MOTION**

**MCNAMARA J.**

[1] This is a motion by the defendants seeking dismissal of the plaintiff's claims on the basis that they disclose no reasonable cause of action within the context of rule 21.01.

[2] By the date of the return of the motion, the plaintiff, by way of an amended Statement of Claim, had withdrawn claims for damages for intentional or negligent infliction of mental distress and for damages for negligent investigation. That left claims against the defendant University for damages for defamation, negligence, and punitive damages. As against the defendant McLellan claims are advanced for defamation and punitive damages.

[3] On the motion the defendant proceeded on three bases:

- a) that the action should be struck on the ground that this court has no jurisdiction;
- b) that the Statement of Claim does not disclose a cause of action in defamation; and
- c) the Notice of Action is a nullity.

### **Basic Factual Background**

[4] The only pleading filed to date is the Statement of Claim which was subsequently amended.

[5] In very brief form, the Amended Statement of Claim alleges that in September of 2009 the plaintiff and the defendant McLellan were both students at the defendant University. They were initially friends. The Claim alleges, however, that sometime in mid-November of 2009 the defendant McLellan allegedly defamed the plaintiff by reporting false allegations to a protection officer at the University Protection Services. It is pled that, according to a Protection Services report dated November 15, 2009, the applicant McLellan falsely reported that:

- Two weeks earlier the plaintiff had approached the defendant McLellan after class and advised her he really liked her, had strong feelings for her, and wanted to pursue his feelings in a relationship knowing she had a boyfriend.
- That the plaintiff told the defendant he was not able to sleep, paced in his bedroom all night to fall asleep, and also advised her he could not live without her.
- That the defendant was concerned for the plaintiff's health as he might hurt himself and did not seem to have any friends or family in the area.
- That the defendant had reported that the plaintiff had asked her out four times and had said things that made her feel uncomfortable.

[6] It is also pled that the defendant McLellan made changes to the original report including allegations that the plaintiff told her that he vomited when he found out she had a boyfriend, and that he was sad that she had met the love of her life.

[7] The plaintiff denies the allegations, says they are false and that the defendant McLellan in making the statements defamed him. He alleges further that the university, in reporting and publishing the false allegations, defamed him as well. The plaintiff also pleads that the defendant university was negligent in the way it handled the entire matter.

### **Analysis**

[8] Motions under rule 21.01 will only succeed where it is plain and obvious, assuming the facts plead to be true, that the pleading discloses no reasonable cause of action. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed. In other words the threshold for sustaining a pleading is not a high one.

[9] With that by way of background, I move on to the arguments raised by the moving parties.

[10] The defendants argue firstly that this court does not have jurisdiction because this matter is of an academic nature. They submit that where the essence of a dispute is in respect of academic matters which are internal to the university and within its internal code, the court

should not intervene because of the special relationship of members of a university, the importance of academic independence, and the special ability of university tribunals to fairly consider their internal procedures and customs. (See *Gauthier c. Saint-Germain*, 2010 ONCA 309.)

[11] Generally speaking, while that statement is accurate, the cases make it clear that whether a dispute is an academic dispute is a question of fact. The only document before me on this motion relative to that issue is the Statement of Claim. There is nothing in that document that would lead to a conclusion that the dispute between these parties arises out of the academic decisions and procedures of the University. Rather the remedy claimed is for defamation and negligence. It does not seek, for example, to have an internal academic decision of the University reversed or anything else of that nature. There is nothing before the court about any internal codes of the University, nor the availability of university tribunals to consider problems of this nature.

[12] It is not plain and obvious that the court has no jurisdiction over the subject matter of the action.

[13] Turning to the claim for defamation, it is common ground that there are three elements which a plaintiff must establish to succeed in a defamation action:

- a) That the words complained of were published;
- b) That the words complained of referred to the plaintiff;
- c) That the words complained of, in their natural and ordinary meaning, or in some pleaded extended meaning, are defamatory of the plaintiff.

Counsel for the defendant in her submissions argued, in essence, that the words complained of in this case did not meet the requirements of the third element set out above.

[14] What makes a statement defamatory was well put by Cunningham J., as he then was, in *Leenen v. Canadian Broadcasting Corp.*, [2000] O.J. No. 1359. In that decision he commented as follows at para. 40:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, a statement which tends to lower that person in the estimation of right-thinking members of society generally and, in particular, to cause the person to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The very essence of a defamatory statement is its tendency to injure reputation, which is to say all aspects of a person's standing in the community. (Emphasis added)

[15] The Statement of Claim alleges, amongst other things, that as a result of the statements in question the plaintiff's reputation in his chosen, very specialized academic field has been adversely affected and that he was forced to transfer to another university. Assuming those facts

to be true and with nothing to the contrary, it is arguable the reputation of the plaintiff could be injured by them. As with virtually all of the cases cited by counsel for the defendant during her submissions on this point, whether or not the plaintiff has been defamed will require evidence. It is certainly, in my view, not plain and obvious that the Statement of Claim discloses no reasonable cause of action in this regard.

[16] I move finally to the argument that the Notice of Action is a nullity.

[17] Counsel for the defendant submits the Notice does not comply with rule 14.03(2) in that it does not contain a short statement of the nature of the claim.

[18] I disagree.

[19] The Notice, in para. 1, clearly states it seeks damages against the defendant University for defamation, negligence, and punitive damages. As against the defendant McLellan, it seeks damages for defamation and punitive damages. That is the inherent or essential character of the claims. It is true that it does not mention the specific events that led to the claims being advanced, but that was remedied by the Statement of Claim filed well within the 30 days required under rule 14.03(3).

[20] This factual situation is very different from that in *Young v. Progressive Insurance*, [2002] O.J. No. 909, that was relied upon by counsel during her submissions. The Notice of Action in the case at bar identifies the same defendants as appear in the Statement of Claim, and there is no evidence before me that the claim in this matter was issued on the last day of limitation as was the case in *Young*. The defendants suffered no demonstrable prejudice from the wording of the Notice of Action.

[21] Counsel for the responding plaintiff conceded during submissions that the Statement of Claim requires amendment, particularly in the area of the claim for negligence. Both counsel advised that they felt they could agree on any amendments should I order the dismissal of the defendants' motion.

[22] That motion is dismissed and the plaintiff is granted leave to amend the Statement of Claim.

[23] The responding plaintiff, having succeeded in resisting the defendants' motion, should have his costs unless there are facts of which I am unaware. If the parties are not able to agree on costs, brief written submissions can be filed within 21 days from the date of this decision.

**Released:** December 20, 2012

**CITATION:** Thode v. University of Ottawa, 2012 ONSC 7284

**COURT FILE NO.:** CV-11-52841

**DATE:** 2012/12/20

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Jordan Luc Thode

Plaintiff/Respondent

**– and –**

University of Ottawa and Gillian McLellan

Defendants/Moving Parties

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**REASONS FOR DECISION ON MOTION**

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The Hon. Mr. Justice James McNamara

**Released:** December 20, 2012

S.C.A. No. 02188

IN THE SUPREME COURT OF NOVA SCOTIAAPPEAL DIVISION

Hart, Jones and Macdonald, JJ.A.

BETWEEN:

SEARS CANADA INC., a body corporate

Appellant

- and -

GLENDA EVELYN ARMSWORTHY WILSON

Respondent

R.H. Haynes  
G. Hardy  
for the appellant

M.T. Pugsley for the respondent

Appeal Heard: March 13, 1990

Judgment Delivered: April 12, 1990

THE COURT:      Leave to appeal granted, the appeal allowed with costs on the motion and on the appeal and the judgment of the chambers judge set aside per reasons for judgment of Jones, J.A.; Hart and Macdonald, JJ.A. concurring

JONES, J.A.:

This is an application for leave to appeal from the dismissal of an interlocutory application for an order estopping the respondent from proceeding with a claim for loss of income in an action for damages.

On November 26, 1987, the respondent commenced an action against the appellant for damages resulting from injuries received when she slipped and fell in the appellant's store. The original statement of claim set forth a claim for special damages, including loss of income. Following discoveries on March 8, 1988, Miss Dawna J. Ring who was solicitor for the respondent, agreed to provide certain financial information to the appellant's solicitor pertaining to the loss of income claim. The respondent owned a nursing home and the information related to the financial operations of the home. Between March and September seven letters were sent to Miss Ring requesting the information. The appellant's solicitor was assured that the information would be forthcoming when it was compiled by the respondent. On October 24, 1988, the appellant gave notice of an application for an order to compel production of the information.

On November 1, 1988, Miss Ring wrote to the appellant's solicitor advising that the claim for loss of income was discontinued. The letter stated in part:

"As per our telephone conversation, I am enclosing for you an Amended Statement of Claim which has been filed at the Law Courts today deleting my client's loss of income claim. As this is no longer a part of my client's claim the documents which were requested at the Discovery are no longer relevant. I trust, therefore, that the application to be heard tomorrow will be withdrawn without costs.

As I also advised you in our telephone conversation my client's claim is now limited to the pain and suffering which she has endured as a result of this accident. She is still not able to work full-time at her home for special care and will be attending at another specialist on Wednesday of this week to have a nerve block put in her spine to assist with the pain. Until her treatment is completed or the doctors are in a position to state what will be permanent or partial disability, I will be unable to attempt to assess her general damages."

As a result the chamber's application was withdrawn. The appellant's solicitor wrote to Miss Ring on November 10, 1988. The letter stated in part:

"I have your letter of November 1, 1988, with the medical report of April 29, 1988 from Dr. Patil and also the letter from Dr. Muirhead of March 22, 1988. I also would confirm that I received an Amended Statement of Claim filed with the Supreme Court on November 1, 1988. I thank you for sending me this documentation.



I first wish to deal with the medical reports that have been forwarded, and it is interesting to note in these reports that your client has failed to disclose to the doctor the events surrounding her tumble from a ladder in her home when she broke her ribs in December of 1987. Further, it is interesting to note, when I reviewed the discovery transcripts and all of the documentation that the major thrust of all the information that we have consulted, is that your client is suffering losses associated with, not only her pain and suffering, but also the economic impact of this situation on her business. You have now confirmed to me in writing that your client is withdrawing her loss of income claim and restricting her damages now to only those of pain and suffering. The reason why I find this to be curious is that you indicated to me on the telephone that the per diem rate available for the nursing home charges has been increased recently such that the Plaintiff's losses have now been covered by the changes in this program."

On January 19, Miss Ring advised the appellant's solicitor that she was no longer acting for the respondent. The respondent subsequently retained her present solicitors. The respondent's solicitors advised the appellant's solicitor that they intended to pursue the claim for loss of income which lead to the present application. The application was for "an order estopping the plaintiff from proceeding with a claim for loss of income in accordance with an amended statement of claim...". In the alternative the notice requested an adjournment of the trial. The application was heard before Mr. Justice Richard in chambers, On the application the respondent took the position that it was not an estoppel situation but should be considered as an application to amend the pleadings.

In dismissing the application the learned chambers judge stated:

"Well, it seems to me that the case law, as outlined in your brief, Mr. Pugsley, sort of puts a lock on my discretion, in this regard, because it is clear that amendments, unless they are, unless I am satisfied that the party applying for them is acting as it states here, as **mala fides**, I have to be satisfied that it is a **bona fide** amendment, and that any injustice can be compensated for in costs. I would think, in this case, that there may be a fairly substantial cost claim for the defendant, in this application. I would certainly entertain an argument on that, but on the basis of the law, I feel that I have to dismiss the defendant's application to prevent any amendment to the statement of claim."

On the application for an adjournment he stated:

"Well, I will grant...Obviously I, having dismissed the application, and implicitly allowed for an amendment, then my next move is to permit, naturally an adjournment to allow you to prepare for that. In view of

the rather peculiar circumstances of this matter, I indicate that costs of this application shall be to the defendant, in any event."

Sears has appealed from that decision. The following is from the appellant's factum:

"Sears submits that the previous amendment of the Statement of Claim to delete the claim for damages in respect of lost income, coupled with the written correspondence of Plaintiff's former counsel verifying the effect of the amendment, give rise to a promissory estoppel."

The respondent contends that the Court has the power to amend the pleadings under Rule 15 of the **Civil Procedure Rules** and generally will do so provided the opposite party can be compensated in costs. The respondent also refers to Rule 21.02(4) which provides as follows:

"The Court may at any time allow any party to withdraw any admission or denial upon such terms as are just."

As I have noted the chambers judge regarded the application in terms of an amendment to the pleadings. We have been referred to a number of cases dealing with amendments under the Rules in other provinces. I refer in particular to **Phil Whittaker Logging v. B.C. Hydro** (1986), 5 C.P.C.(2d) 71. In that case the defendant's solicitor advised the plaintiff's solicitor that the defendant would admit liability. Legg, J. stated that the admission was not a judicial admission, as it had not been made in the defence or pursuant to a notice to admit. Notwithstanding that fact he entertained a motion under Rule 31(4) of the British Columbia Rules which authorized the Court to grant leave to withdraw an admission. In applying the principles applicable under the **Rule** he concluded at p. 77:

"After weighing the circumstances in favour of and against permitting the withdrawal of the admission, I have concluded that it is in the interests of justice to deny the defendant's application.. Although the prejudice to the defendant is considerable if the admission stands, where the admission is made with full knowledge of the consequences and acted upon by the plaintiff for a period as long as two years, as here, to permit the withdrawal of the admission at this late stage is contrary to all principles of fairness. Justice requires that a party be kept to this agreement unless that agreement has been obtained by fraud, duress or mistake. Justice also requires that the Court should encourage certainty in the law and should not lightly grant leave where there has been no misunderstanding of the significance of the admission. The granting of leave under such circumstances would encourage irresponsibility on the part of solicitors."

He also found that the admission constituted a promissory estoppel.

In **McLuskie v. Sakai** (1988), 21 C.P.C. (2d) 286 the British Columbia Court of Appeal dealt with a conversation between the plaintiff's solicitor and an insurance adjuster who advised the solicitor that liability was not in issue. The majority concluded that the rules which permitted the Court to grant leave to withdraw an admission applied "only to admissions of fact and of authenticity of documents made pursuant to a notice to admit as provided in subr.(l) of R.31." The Court found that on the facts of the case the statement did not constitute a promissory estoppel.

In **Antipas et al v. Coroneos et al** (1988), 26 C.P.C. (2d) 63 Saunders, J. in the Ontario Supreme Court dealt with a motion to withdraw an admission of liability contained in a statement of defence. The admission was made pursuant to instructions from the insurer and not from the defendants. Following the admission the plaintiffs substantially increased their claim. Saunders, J. granted leave to withdraw the admission.

While similar principles are involved with deference to the learned chambers judge the application could not simply be regarded as a motion to amend. I agree with Legg, J. in the **Whittaker Logging** case, *supra*, that this was not a "judicial admission" under the Rules. However as pointed out in the **McLuskie** case *supra*, the procedural **Rules** do not apply. What is involved is a solicitor's undertaking that the claim for loss of income would not be pursued. There is no suggestion that the solicitor was not authorized to give the undertaking.

In **H. Clark, Ltd. v. Wilkinson**, [1965] 1 All E.R. 934, Lord Denning, M.R. stated at p. 936:

"An admission made by counsel in the course of proceedings can be withdrawn, unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn, see **Clifton (the Ship)** (1835), 3 Knapp.375; but otherwise an admission can be withdrawn. For instance, an admission is often made by error in a pleading. It can be withdrawn if the other party has not been prejudiced, or, indeed, if any prejudice can be cured by compensation in costs. Another illustration is to be found in R.S.C., Ord. 27, r.2(2); under which even a formal admission in a pleading can be withdrawn at any time on such terms as may be just.

We were referred to cases where a compromise or settlement has been made by counsel acting within his ostensible authority. That of course is binding, as in the case of **Strauss v. Francis** (1866), L.R. 1 Q.B. 379. But those are very different and they rest on the simple

principle that a principal is bound by a contract made by his agent within his ostensible authority.

There is nothing in the nature of an estoppel here. The matter was referred straight away by the district registrar to the judge, and the affidavits put fully before the judge. Everything was before him. I am quite clear this admission could be withdrawn. The affidavits before the judge show a triable issue. Leave to defend should be given."

Salmon, L.J. stated at p. 937:

"No doubt a statement made by counsel, just like a statement made by the client, if acted on by the other side to their prejudice, cannot be withdrawn. This is because an estoppel would then arise. Further counsel is the ostensible agent of his client to make an agreement during the course of a trial settling the case. If he does so, his client is bound by the agreement, just as anyone is bound by an agreement made on his behalf by another who is ostensibly his agent to make the agreement.

To my mind the circumstances here are quite different. It is not even suggested that the statement made by counsel before the registrar, which may have been made under a misapprehension as to the state of the law, was acted on by the plaintiffs. Clearly, if a man were appearing in person and made an admission during the course of any interlocutory proceedings or during the course of the trial and that statement was not acted on by the other side to their detriment, there is no rule of law that prevents him from withdrawing it. I do not see how a man can be any worse off in this respect because, instead of making the admission himself, the admission is made on his behalf by counsel."

In the **Whittaker Logging** case, *supra*, Legg, J. stated at p. 77:

"The Supreme Court of Canada, in **Engineered Homes Ltd. v. Mason**, [1983] 1 S.C.R. 641, 51 B.C.L.R. 273 at 277, 49 C.B.R. (N.S.) 257 146 D.L.R. (3d) 577, 47 N.R. 379, quoted the following definition of promissory estoppel from 16 Hals. (4th) 1017, para. 1514:

'1514. Promissory estoppel. When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or

assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has no introduced. This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development and is still expanding. It differs from estoppel in pais in that the representation relied upon need not be one of present fact."

That quote is based on the decision of Denning, L.J. in **Combe v. Combe**, [1951] 1 All E.R. 767 (C.A.). In that case Denning stated that the principle applied "even though it is not supported in point of law by any consideration but only by his word". See the **Whittaker Logging** case *supra* at p. 79.

In **Dixon v. Crowhurst** 14 N.B.R. (2d) 401 Hughes C.J.N.B. in delivering the judgment of the majority stated at p. 404:

"The transcript of the proceedings at trial shows conclusively that Counsel for both parties acquiesced in the trial Judge's suggestion that oral evidence was unnecessary to aid in the interpretation of the description of the defendant's lot. In my view the parties are bound by the conduct of their Counsel at trial and cannot be heard to complain that they should have taken a different course. I would therefore refuse to order a new trial of the action."

See also **Dominion Act Co. v. Murphy** (1923), 54 O.L.R. 372 (C.A.).

I would also note that the Revised Code of Professional Conduct adopted by the Council of the Canadian Bar Association in August, 1987 states at pps.38-39:

"13 An undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceeding must be strictly and scrupulously carried out. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility."

I refer to the comments of Legg, J. *supra*, in the **Whittaker Logging** case as to the importance of enforcing such commitments. There was no misunderstanding as to the commitment in this case and it was acted upon. In my view this gave rise to a promissory estoppel which bound the respondent. In my view it would be contrary to the principles of fairness to permit the respondent to withdraw the admission at this stage of the proceedings. I would grant leave to appeal, allow the appeal with costs on the motion and on the appeal and set aside the judgment of the chambers judge. The appellant is entitled to an order directing that the respondent be estopped from proceeding with a claim for loss of income in the action.

J.A.

Concurred in:

Hart, J.A.

Macdonald, J.A.

1987

S.H. 62649

IN THE SUPREME COURT OF NOVA SCOTIA  
APPEAL DIVISION

on appeal from the

SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION

BETWEEN:

GLEND A EVELYN ARMSWORTHY WILSON

Plaintiff/Respondent

- and -

SEARS CANADA INC.

Defendant/Applicant

HEARD BEFORE: The Honoucable Mr. Justice K. Peter Richard In Chambers

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: October 12 , 1989

COUNSEL: Ross Haynes, Esq., for Applicant  
M. Pugsley, Esq., for Respondent

CHAMBERS APPLICATION ON APPEAL

S.C.A. No. 02188

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

SEARS CANADA INC., a body corporate

Appellant

- and -

GLEND A EVELYN ARMSWORTHY WILSON

Respondent

REASONS FOR JUDGMENT BY: JONES, J.A.



*Indexed as:*

**Reading & Bates Construction Co. v. Baker Energy Resources Corp.**

**Between**

**Reading & Bates Construction Co. and Reading & Bates  
Horizontal Drilling Ltd., Plaintiffs, and  
Baker Energy Resources Corporation and Baker Marine  
Corporation, Defendants**

[1988] F.C.J. No. 1025

[1988] A.C.F. no 1025

25 F.T.R. 226

22 C.I.P.R. 240

24 C.P.R. (3d) 66

13 A.C.W.S. (3d) 240

Court File No. T-1879-83

Federal Court of Canada - Trial Division  
Toronto, Ontario

**McNair J.**

Heard: September 19, 1988

Judgment: November 9, 1988

*Practice -- Appeal for prothonotary's decision -- Not trial de novo -- Discovery -- Examination for discovery -- Reference on accounting of profits in patent infringement action -- Only relevant questions need be answered -- Only relevant documents ordered produced.*

This was an appeal by the defendants from a prothonotary's order requiring the defendants to answer questions and produce documentation regarding profits made by the defendants on an installation found to have infringed the plaintiff's patent. The plaintiffs successfully sued the defendants for patent infringement with respect to one particular installation of a gas pipeline. The plaintiffs elected an accounting of profits rather than damages. The defendants refused to answer questions or provide documentation respecting profits made from other installations of pipeline on the grounds that the plaintiffs were only entitled to the information respecting profits from the one pipeline installation found to infringe the plaintiff's patent. The prothonotary ordered, inter alia, the production of all financial statements from 1980 until the date of the

order and ordered that numerous question asked at discovery be answered. The defendants appealed the order.

HELD: The appeal was allowed. An appeal from a prothonotary's decision was not a trial de novo. The prothonotary's decision must be shown to be wrong on the facts or wrong in principle. The purpose of discovery was to assist the parties in proving facts necessary for a determination of the matters in issue. Documents should only be ordered produced where they were shown to be relevant. On a reference as to damages or an accounting of profits, the party being discovered should only be required to answer questions raised by the reference itself. The prothonotary erred in ordering the production of revenue breakdowns for contracts other than the job specifically in issue. Questions designed to elicit financial information which might assist the plaintiff in advancing its case or damaging the defendant's case should be answered provided they could be fairly seen as pointing to a productive train of inquiry. The aspect of the prothonotary's order respecting the production of all monthly financial statements was accordingly limited to production of those statements relevant, on the above test, to the reference.

S. Lane, for the Plaintiffs.

S. Anissimoff and E.M. McMahon, for the Defendants.

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**McNAIR J.** (Reasons for Order):-- This is an appeal by the defendant, Baker Energy Resources Corporation, from an order of the Associate Senior Prothonotary made on September 8, 1988 compelling answers to certain questions put to the defendant's officer on his examination for discovery held on April 22, 1987. The appeal is from that part of the prothonotary's order which ordered the party being examined to answer the questions and to produce the documents comprehended by Questions 37, 77, 78, 414, 415, 411, 234, 237, 247 and 132. The grounds urged in support of the appeal are set out in the notice of motion, and read as follows:

(a) The Defendant infringed Canadian Patent No. 1,140,106 ("pull-back patent") in laying a pipe under the St. Lawrence River in 1983, and the parties are now engaged in a reference as to the profits made by the Defendant.

(b) The above questions relate to:

(i) jobs other than the St. Lawrence River crossing; and

(ii) the time period from 1980 to 1988.

(c) The Associate Senior Prothonotary erred in law in determining that answers to the above questions were relevant and in requiring the Defendant to answer the above questions.

The matter arises from actions brought by the plaintiffs for infringement of two patents relating to the installation of a gas pipe line under the St. Lawrence River near Trois Rivieres, Quebec, in the summer of 1983. On March 20, 1986 the court ruled that the plaintiffs' follow liner patent was invalid, but held in the other action that the defendant was liable for infringement of the plaintiffs' pull back patent and indicated that there would be further directions as to the procedure on the reference as to damages or an accounting of profits as requested by counsel for the plaintiffs. The action against Baker Marine Corporation and Gaz Inter-Cite Quebec was dismissed with costs. On November 20, 1987 the Federal Court of Appeal dismissed

an appeal and cross-appeal with costs. On June 2, 1986 the Associate Senior Prothonotary ordered the defendant, Baker Energy Resources Corporation, to make available for inspection and the taxing of costs the following documents: 207

All documents and records relating to the crossing of the St. Lawrence River near Trois Rivieres including forecasts of expenses and profits, bills of material, actual expenses incurred, all correspondence relating to this project, all books of account, accounting records and all management reports; and all financial statements, audited or otherwise, of the defendant, Baker Energy Resources Corporation, from 1980 to date.

The prothonotary also ordered that an officer of the defendant be presented for examination on discovery. On April 22, 1987 Billy Jack Greer was examined at Toronto, Ontario, on behalf of the defendant. On August 4, 1988 the plaintiffs brought a motion seeking an order that the defendant comply with the prothonotary's order of June 2, 1986 and answer certain questions objected to and provided written answers to undertakings given at the time. The prothonotary made an order on the same date requiring the defendant to provide answers in writing to all outstanding undertakings, and adjourned the matter over to September 8, 1988. The prothonotary made an order on that date requiring the defendant to provide answers in writing to certain questions put to its officer at the discovery on April 22, 1987. The defendant now appeals that part of the order relating to the questions set out in its notice of motion.

The present case raises two issues for determination, namely: (1) the recurring question of the principles applicable to prothonotary appeals; and (2) whether the propriety of the questions put on discovery is determinable on the basis of their relevance to the issues defined by the reference.

Rule 336(5) of the Federal Court Rules provides for appeals from an order or decision of a prothonotary, and it is unnecessary to set it out verbatim. Suffice it to say, the Rule has been the subject of some judicial consideration.

In my view, the law was correctly stated by Mr. Justice Collier in *Reading & Bates Construction Co. v. Baker Energy Resources Corporation* (1987), 12 C.I.P.R. 260 at pp. 261-262 as follows:

. . . an appeal from the decision of a Prothonotary is not a trial de novo

...

It is not the function of the Trial Division, sitting on appeal from Prothonotaries, to substitute its discretion for that of the Prothonotary. It must be shown the Prothonotary was wrong, in that he exercised his powers on a wrong principle, or on a complete misapprehension on the facts, or for some other compelling reason requiring interference by a Judge sitting in an appellate position.

Ample support for this principle may be found in the case of *Algonquin Mercantile Corporation v. Dart Industries Canada Ltd.* (1984), 5 C.I.P.R. 40 (F.C.A.) wherein the court held that the order under appeal, being discretionary, should be overruled only if the motions judge was clearly wrong on the facts, or proceeded on an erroneous principle of law, or his decision resulted in some injustice to the appellant. None of these circumstances were existent in the case on appeal. It seems to me that it is now authoritatively settled as a rule of practice that an appeal from a discretionary order, whether it be that of a prothonotary or a motions judge, should be treated as an appeal rather than a rehearing on the merits, and the order appealed from should be interfered with only when it can be demonstrated that such order was clearly wrong in law or on the facts. For a useful review of the comparable principle applicable to appeals from interlocutory

The purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of the matters in issue between the parties. The prevailing trend today favours broadening the avenues of fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary. Discovery can serve to bring the issues more clearly into focus, thus avoiding unnecessary proof and additional costs at trial. Discovery can also provide a very useful tool for purposes of cross-examination.

The broadening scope of discovery is reflected in Rule 465(15) which reads:

465.(15) Upon examination for discovery otherwise than under paragraph (5), the individual being questioned shall answer any question as to any fact within the knowledge or means of knowledge of the party being examined for discovery that may prove or tend to prove or disprove or tend to disprove any unadmitted allegation of fact in any pleading filed by the party being examined for discovery or the examining party.

Fox, *Canadian Patent Law and Practice*, 4th ed., makes the following accurate statement regarding production of documents at p. 456:

Production should be made of all documents that directly or indirectly enable the party seeking production to better his own case or destroy that of his adversary, or may fairly lead him to a train of inquiry that may have either of these consequences, or if generally the documents are such as to throw light on the case. In patent cases the court is more than ordinarily cautious in ordering the production of documents beyond what is necessary to prove a party's case. Documents dated after the inception of the action will not be required to be produced.

The case authorities afford some useful guidelines bearing on the issue of relevance vis-a-vis the determination of whether the learned prothonotary was clearly wrong in compelling answers to the questions enumerated in the defendant's notice of motion. I will endeavour to review briefly the ones I consider to be most applicable.

1. The test as to what documents are required to be produced is simply relevance. The test of relevance is not a matter for the exercise of the discretion. What documents parties are entitled to is a matter of law, not a matter of discretion. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Trigg v. MI Movers International* (1987), 13 C.P.C. (2d) 150 (Ont. H.C.); *Canex Placer Ltd. v. A.-G. B.C.* (1976) 63 D.L.R. (3d) 282 (B.C.S.C.); and *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).
2. On an examination for discovery prior to the commencement of a reference that has been directed, the party being examined need only answer questions directed to the actual issues raised by the reference. Conversely, questions relating to information which has already been produced and questions which are too general or ask for an opinion or are outside the scope of the reference need not be

3. The propriety of any question on discovery must be determined on the basis of its relevance to the facts pleaded in the statement of claim as constituting the cause of action rather than on its relevance to facts which the plaintiff proposes to prove to establish the facts constituting the cause of action. Additionally, where a reference has been directed, the application of Rule 465(15) requires that the answers on discovery be restricted to questions as to facts that may prove or tend to prove or disprove or tend to disprove any unadmitted allegation of fact placed in issue on the reference: Armstrong Cork Canada Ltd. v. Domco Industries Ltd. (1983), 71 C.P.R. (2d) 5 (F.C.A.).
4. The court should not compel answers to questions which, although they might be considered relevant, are not at all likely to advance in any way the questioning party's legal position: Canex Placer Ltd. v. A.-G. B.C., supra; and Smith, Kline & French Ltd. v. A.-G. Can. (1982), 67 C.P.R. (2d) 103 (F.C.T.D.) at p. 108.
5. Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances: Smith, Kline & French Ltd. v. A.-G. Can., supra, per Addy J. at p. 109.
6. The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged: Carnation Foods Co. Ltd. v. Amfac Foods Inc. (1982), 63 C.P.R. (2d) 203 (F.C.A.); and Beloit Ltee/Ltd. v. Valmet Oy (1981), 60 C.P.R. (2d) 145 (F.C.T.D.).

The following are the questions in issue, as enumerated in the defendant's notice of motion, viz:

Question Discovery  
No. Page Question

37	8	Is Berco still using the method it used on the crossing of the St. Lawrence River in any of its operations including those outside Canada?
77	18	Provide a listing of all the jobs performed by Berco since its inception.
78	18	Provide a listing of all the jobs performed by Berco worldwide, as they relate to Berco's income and profits, for the period 1982 to 1984.
414	140	Provide the breakdown of revenue from the contract which is the

subject of this action for the year ended December 31, 1983 and second, other contracts and, third, revenue not related to contracts specifying the nature of that revenue.

- 415 140 With respect to costs of the contracts for the year ended December 31, 1983, provide costs breakdown for the contract at issue and for other contracts. In addition, provide an analysis of the costs by type of expense, that is wages, supplies, subcontracts and other types of expenses on the Gaz job and on other contracts.
- 411 136 Advise if Berco was involved with any other companies in 1983 that carried on business activities relating to directionally controlled horizontal drilling.
- 234 63 Produce all monthly financial statements beginning in 1980 and up to the present.
- 237 65 Produce the monthly financial statements from mid-1984 to present, the period of Mr. Greer's employment with Berco.
- 247 69 Produce an unaudited financial statement for the period ending December 31, 1986 and monthly financial statements for 1987 to date.
- 132 35 Produce any promotional brochures or literature of Berco of any sort produced by Berco since 1983.

The principal objection taken by defendant's counsel is that the questions, or at least substantial portions of the same, are irrelevant to the issues raised by the reference. Mr. Anissimoff argues that these issues must necessarily be confined to taking an account of the actual profits made by the defendant on the St. Lawrence River crossing project, and resulting from the patent infringement. He contends strenuously that the appropriate avenue of inquiry open to the plaintiffs on the reference is simply to elicit information as to the defendant's direct and indirect costs in employing the infringing method on the so-called Gaz job, and that anything going beyond these specific terms of reference is irrelevant and in the nature of a fishing expedition.

Plaintiffs' counsel emphasizes the point that what is under appeal is the prothonotary's order of September 8, 1988 relating to the subject questions and he presses the argument that this discretionary order should not be reversed unless it can be demonstrated by the defendant that the prothonotary was clearly wrong. As to the questions themselves, he contends that the plaintiffs are entitled to all information pertaining to any expenses which might be offset against the profits earned from the Gaz job for which the defendant is liable to account. Mr. Lane acknowledges that what falls to be determined by the reference is an account of the profits made by the defendant on the Gaz project by reason of its infringement of the plaintiffs' pull back patent. Nonetheless, he urges that it becomes very important for the plaintiffs to know whether this pull back method was employed by Berco in other like jobs throughout the world.

The case of *Teledyne Industries Inc. v. Lido Industrial Products Ltd.* (1982), 68 C.P.R. (2d) 204 (F.C.T.D.), relied on by plaintiff's counsel, was an appeal from a report of the prothonotary relating to an accounting of profits in a patent infringement action. The case provides an extensive review of the

authorities and distinguishes the principles governing an award of damages in a patent infringement action from those pertaining to the equitable remedy of an accounting for profits derived from the act of infringement. The plaintiff adduced expert accounting evidence for determining the nature of "net profits", which the prothonotary accepted. The court held, *inter alia*, that his decision to apply the differential accounting or direct costing method of accounting was correct under the circumstances.

Mr. Justice Addy stated the principle on this aspect of the case at p. 213:

. . . the infringer is entitled to deduct only those expenses, both variable and fixed, which actually contributed to the sums received and for which he is liable to account. It follows that no part or proportion of any expenditure which would have been incurred had the infringing operation not taken place, is to be considered as deductible.

In *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.*, [1963] R.P.C. 45, a patent infringement action alluded to by Addy J. in *Teledyne*, the successful plaintiff elected to take an account of profits and the issue went to the proper form of order to be made, which Pennycuick J. answered at p. 60 as follows:

. . . what the plaintiff who elects in favour of an account of profits is entitled to, is simply an account of profits in the sense which I have indicated, that is, what has the plaintiff [sic] expended upon manufacturing these goods? What is the price which he has received on their sale? and the difference is profit. That is what the plaintiffs claim in the order for an account as formulated by them; that is simply an account of the profits made by the defendants in the manufacture and sale of the brassieres U.15 and U.25.

Clearly, the questions must be judged by the legal test of their relevancy to the profits earned by the defendant from the patent infringement. In fairness to the learned prothonotary, it must be pointed out that he lacked the benefit of any expert accounting evidence which might have afforded some useful guidance in the determination of these profits, unlike the *Teledyne* case.

The main thrust of Questions 37, 77 and 78 is directed to other operations and other jobs performed by the defendant, Berco, regardless of any qualifying words of limitation. In the case of *Carnation Foods Co.*, *supra*, the Court of Appeal was unanimous in its view that the motions judge erred in law in ordering to be answered questions relating to a possible corporate connect on between the patent infringer and the U.S. company or any other corporations on the ground that such corporations were not parties to the proceedings and the questions were irrelevant to the unadmitted allegations of fact as pleaded.

In my opinion, the learned prothonotary erred in law in ruling that these questions were relevant to the determination of the profits made by the defendant on the St. Lawrence River crossing project and attributable to the patent infringement. I fail to see how they would be likely to throw any light on that topic. The questions are therefore disallowed.

In my view, Question 411 falls within the same category as the preceding questions. I find that the prothonotary erred in permitting this question inasmuch as it is irrelevant to the issues raised by the reference. Consequently, the question is disallowed.

It seems to me that the same result must obtain with respect to Question 132, namely, error in law. I fail to see what useful, probative value these documents could have in a reference for an accounting of profits resulting from the particular infringement complained of. The question is disallowed.

Defendant's counsel submits that the second and third parts of Question 414 relating to other contracts and other revenue apart from contracts are totally irrelevant to the issue of the profits earned from the patent infringement. Plaintiffs' counsel asserts that these additional portions of the question are relevant to the reference issue, but fails to explain why. As indicated, the learned prothonotary did not have the benefit of any expert accounting evidence that would tend to support the plaintiff's position. In my view, he erred in law in allowing the second and third parts of this question relating to revenue breakdowns for other contracts and all sources of revenue generally by reason that these are much too general and far-reaching in terms of the scope of the reference. The first part of the question down to and including the words "the year ended December 31, 1983" is clearly relevant to the issue raised by the reference, and is allowable accordingly. The remainder of the question appearing thereafter must be disallowed on the ground of error as being irrelevant to and outside the scope of the reference.

Applying the same reasoning to Question 415, I consider that the prothonotary erred in law in requiring the defendant to provide cost breakdowns and analyses of expenses for other contracts, apart from the Gaz job. The additional portions comprehended by the words "and for other contracts" in the fourth line of the question and the words "and on other contracts" appearing at the end thereof are disallowed as being irrelevant to and outside the scope of the reference. The remainder of the question is allowed.

Questions 234, 237 and 247 come within the category of questions directed to obtaining financial information which might somehow assist the questioner in advancing his own case or aid in damaging the case of his adversary, or which might fairly lead to a train of inquiry that could have either of these consequences.

Defendant's counsel objects to the production of all monthly financial statements, whether limited to a particular time frame or otherwise, on the ground that these do not come within the category of documents and records relating to the St. Lawrence River crossing as envisaged by the order of June 2, 1986, and that the request for their production is nothing more than a blatant attempt to embark on an aimless fishing expedition. Plaintiffs' counsel rejoins by quoting the concluding portion of the said order in reference to all financial statements of the defendant generally from 1980 to date. Incidentally, this concluding portion is separated from what precedes it by a semicolon but, in my view, the punctuation mark is not particularly determinative. What is more significant, in my view, is the absence of any explanation as to how or why these monthly financial statements could fairly lead to a train of inquiry which might have some useful probative value in terms of relevancy.

Counsel referred repeatedly to the issues raised by the reference, but I can find no evidence of anything which would define and identify those issues beyond the plaintiffs' election for an accounting of profits from the patent infringement and the order of June 2, 1986 particularizing the documents to be produced by the defendant. The bottom line position of counsel for the defendant is simply that the monthly financial statements of Berco from 1980 up to the present time go far beyond the ambit of documents and records relating to the Gaz job, and are thus irrelevant and outside the scope of the reference.

Viewing Questions 234, 237 and 247 collectively, the test to be applied, as it seems to me, is whether they can be fairly seen as pointing to a productive train of inquiry which might directly or indirectly advance the plaintiffs' case or damage the defendant's case. *Everest & Jennings Can. Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856 (C.A.) approved the train of inquiry principle as the correct test of relevancy for purposes of discovery, and ordered the production of the whole file from which a particular letter had been produced.

In my view, it can hardly be said that the production of existent monthly financial statements is totally irrelevant to an accounting for the profits earned by the defendant from its infringement of the plaintiffs'



patent. Conceivably, these could illustrate some cost expenditure or proportionate part thereof which is not so connected with the infringing activity as to be properly deductible. The difficulty here is compounded by the fact that the references to monthly financial statements are somewhat duplicitous and overlapping and there is no clear definition of what is meant by the words "the present". But for that, I am not prepared to go so far, as to rule that the prothonotary clearly erred in ordering the production of existing monthly financial statements from the standpoint of their relevancy to an accounting for profits. With respect, I consider that he did err in allowing Question 237 by reason that it is totally redundant when taken in context with Question 234. Question 237 is disallowed accordingly. 213

As to Question 247 I am of the opinion that the learned prothonotary erred in requiring production of monthly financial statements from January 1, 1987 to date. This area of inquiry represents, in my view, nothing more than a fishing expedition that would have little probative value in view of the extended time frame. There is also the factor of the burdensome inconvenience involved. I rule therefore that Question 247 is allowable as to the portion concluding with the words "ending December 31, 1986" with the remainder being deleted therefrom.

Coming back to Question 234, I am of the opinion that there is no patent eff or on the broad issue of its relevancy to the accounting for profits, provided the question is put in the following modified form:

Question 234: Produce all existent monthly financial statements beginning in 1980 and up to and including December 31, 1986.

In the result, the defendant's appeal is allowed, save only for Question 234 in the foregoing modified form. To that extent, the plaintiffs achieved a limited degree of success so there will be no order as to costs. An order will go accordingly.

McNAIR J.

1986

SN. No. 04087

**IN THE SUPREME COURT OF NOVA SCOTIA**(Cite as: *Cape Breton Development Corporation v. D. Roper Services Limited*, 2002 NSSC039)**Between:****CAPE BRETON DEVELOPMENT CORPORATION****Plaintiff/Defendant by Counterclaim****v.****D. ROPER SERVICES LIMITED****Defendant/Plaintiff by Counterclaim**

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**DECISION ON COSTS**

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**HEARD:** Before the Honourable Justice A. David MacAdam, at Sydney, Baddeck and Halifax, Nova Scotia

**DATES:** Trial dates: May 2, 3, 7, 8, 9, 22, 23, 24, 28, 29, 30, 31, June 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 27, 28, 2001; Oral Argument: October 3 & 5, 2001; Final Written Submissions: October 25, 2001; **Written Submissions on Costs: January 15, January 31, 2002**

**WRITTEN RELEASE**

**OF DECISION:** March 5, 2002

**COUNSEL:** George W. MacDonald, Q. C. & Aidan J. Meade, counsel for the plaintiff/defendant by counterclaim  
Gary J. Corsano & Nicole E. LeBlanc, counsel for the defendant/plaintiff by counterclaim

MacADAM, J.:

- [1] Following a trial involving 25 days, or more, of evidence, lengthy written submissions followed by two days of oral argument and further written submissions, the plaintiff, Cape Breton Development Corporation, (herein “Devco”), was awarded damages in the amount of \$270,307.0, and the defendant, D. Roper Services Limited (herein “Roper”), was awarded damages on its counter-claim in the amount of \$10,000.00. The parties have applied for costs, having regard to the claims made by each party and the decision of the court.
- [2] In respect to the plaintiff’s claim, Devco acknowledges it was originally in the amount of \$772,946.00, but was amended at the outset of the trial to a claim of \$313,946.00. On the other hand, it says, Roper, pursuant to one of the expert reports it had filed, claimed the sum of \$7,310,000.00 under its counter-claim, although under a subsequent report claimed the sum of \$3,757,000.00. In effect, a review of the expert’s reports filed by Roper shows varying amounts being claimed, depending on which scenario advanced by the expert was accepted by the court.
- [3] Devco says, having been substantially successful in both maintaining its own action and in defending Roper’s claim, it is entitled to costs in both actions. Counsel observes that based on a claim of \$3,757,000.00, the award of \$10,000.00 represents .266% of the claim and therefore Roper can only be regarded as being a nominally successful and Devco should be entitled to costs in defending.
- [4] The discretionary power of the court in respect to costs is contained in *Civil Procedure Rule 63.02*, which provides:

63.02(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
  - (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]
  - (c) direct whether or not any costs are to be set off.
- [5] *Civil Procedure Rule 63.04(2)* stipulates a number of factors the court may consider in fixing costs, including the amount claimed, the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding and the manner in which

- the proceeding was conducted.
- [6] Recognizing that traditionally and pursuant to *Civil Procedure Rule 63.03(1)*, costs follow the event, it is clear a party may “lose” not only by having an adverse decision on liability or responsibility, but also in obtaining an award substantially less than the amount claimed. Thus, in *Nathu v. Imbrook Properties Ltd.*, (1992) 4 Alta. L.R. (93d) 149 (C.A.), the Court of Appeal considered costs where the defendant had challenged and successfully reduced the plaintiff’s damage award for economic loss. The court, at p. 151, stated:

While costs routinely follow the event, all costs are not dictated by the bottom line of recovery. Sensibly the expense of litigating unsuccessful issues may not be recoverable, or may even be awarded to the successful opponent, notwithstanding that the plaintiff succeeds on other issues. It must and does lie within the Court’s discretion.

Within the case law, the award of selective costs was recognized as long ago as 1893 see *Forrester v. Farquhar* [1893] 1 Q.B. 564. It was recently affirmed in *Herman v. Miller*, [1988] 2 W.W.R. 72, where Gerein J. ruled:

In short, the plaintiff put forth a serious and very substantial claim which is notoriously difficult to prove. The defendants of necessity had to resist and they did so successfully. It would be grossly unfair were the successful defendants still required to indemnify a party who had been unsuccessful in pursuing a claim and had expended large sums of money in such a pursuit.

As I see it, the plaintiff obtained a part of what he sought and having been successful in the broad sense he is entitled to taxable costs as I ordered in my judgment. However, in this instance he should not be permitted to include in those taxable costs any tariff items or disbursements which relate to the witness tendered on behalf of the losing cause.

A similar result calls for similar relief here. The plaintiff - respondent, Mrs. Nathu will recover the costs of the trial to be taxed under Column 6 of Schedule “C” with no restrictive rule to apply. That was the trial direction. But having failed in the outcome, on damages, the plaintiff will not be allowed to tax as tariff items fees or disbursements pertaining to her witnesses on the calculation of damage issue.

### **THE PLAINTIFF’S CLAIM**

- [7] Both counsel agree the plaintiff’s claim should be taxed under Tariff A, using as the amount involved the sum of \$270,307.05 being the sum recovered by Devco. Counsel

also agree the appropriate scale to be applied is Scale 5. In this regard, Devco references the decision of Justice Stewart in *Hines v. Englund* (1993), 124 N.S.R. (2d) 156, where, following an 11 day long trial and evidence from several experts, and in determining the appropriate scale was Scale 4, Justice Stewart, at p. 162, stated:

I agree with the plaintiff that costs should be allowed on something more than the basic scale suggested by the defendant, given the length of the trial, the number of expert witnesses, the preparation required both at discovery and at trial, the numerous medical reports and documentation, and the detailed medical questions and actuarial evidence.

- [8] Also, even where successful, parties have been denied costs when it was determined to be appropriate. In *Cranwill (Next Friend of) v. James*, [1995] A.J. No. 789, Lomas, J., denied costs to a successful defendant. Although finding the defendant was negligent, and the negligence was a material factor resulting in the commencement of the litigation, judgment was awarded in favour of the defendant on the courts finding of a lack of causation. Justice Lomas stated he was exercising his discretion, in the circumstances, and depriving the successful defendant of his costs.
- [9] Counsel says the length of the trial, the complexity of the issues, the extensive exhibit books and expert evidence, all of which were complicated by the length of time between the date of the events in question and the trial, combined to make Scale 5 appropriate. Roper simply adds that costs should be calculated on the basis of Scale 5 of Tariff A.
- [10] Notwithstanding the concurrence and apparent agreement of counsel on this issue, I am not satisfied this case involved the degree of complexity that would warrant the application of Scale 5 and, therefore, only allow costs at Scale 4. Why this matter took some 15 years to proceed to trial is unclear and certainly there was nothing in the evidence to justify this long delay. Although there was extensive evidence, involving more than twice the number of days that apparently were required in *Hines v. Englund*, *supra*, the factual issues were not particularly complex, other than the degree to which the witnesses, because of the long delay in bringing this matter to trial, had to rely on documents to refresh their memories and recollections of the events. There were a number of legal issues, but again, none so complicated or unique to warrant the application of Scale 5.
- [11] Roper, notwithstanding Devco was successful in obtaining a substantial award of damages, says it is entitled to costs because Devco, at the outset and during the course of the trial, discontinued or dropped significant portions of its claim. Counsel calculates that in excess of 50% of the amount claimed by Devco was dropped or discontinued by the plaintiff and in this regard refers to *Civil Procedure Rules 40.02* and *63.03(3)*, where provision is made for costs against a party discontinuing a proceeding or withdrawing a cause of action. Counsel also references *Civil Procedure Rule 63.04(2)*, where, as noted earlier, provision is made for the court to consider, in fixing costs, the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding, as well as to consider the manner in which the proceeding was conducted. Counsel suggests, given the discontinuance of these claims, Roper should be compensated for the

- preparation, and in some cases dealing with the claims until withdrawn during trial, by awarding costs on an amount involved of \$462,090.64, being the total of the claims withdrawn. Counsel also suggests Devco failed to introduce any evidence to support its claim of misrepresentation against Roper and therefore this is a further factor to be taken into consideration in reducing any costs awarded to Devco.
- [12] Counsel says Devco failed to meet its obligations in respect to disclosure of documentation, having in mind a number of documents introduced during evidence which had not previously been disclosed to Roper. Counsel suggests had these documents been properly disclosed there would have been an opportunity to review them in preparation for trial and this may very well have affected the duration of the proceedings. Counsel again suggests this is a further factor to be taken into account in reducing the amount of costs awarded to Devco.
- [13] Although the late withdrawal of claims, as well as the late production of documents are matters to be taken into account in view of the general discretion provided under *Civil Procedure Rule 63*, including *63.04*, I am not persuaded the appropriate course is simply to award Roper costs based on the amount of the claims withdrawn, nor to disentitle Devco to costs, if indeed that is an alternative position advanced by Roper, on the basis of late production and disclosure. They are, however, circumstances and factors which I am prepared to take into account in determining an adjustment against the costs otherwise payable to Devco as the successful party on its claim. Having regard to *Civil Procedure Rule 63.04(2)*, it would appear appropriate that an adjustment be made to reflect the issues and concerns raised by Roper in respect to Devco's conduct in handling this matter preceding and up to and including the commencement and conduct of the trial itself.
- [14] Devco is therefore awarded, on its claim, costs calculated on an amount involved of \$273,3007.05, on the basis of Scale 4 of Tariff A, less 20%. The reduction of 20% applies only to the fees and not to the proper disbursements incurred in the presentation of the case, although, of course, disbursements relating to any withdrawn claims are not awarded.

### **THE DEFENDANT'S COUNTERCLAIM**

- [15] Roper claimed against Devco for breach of contract alleging damages, as noted earlier, ranging from in excess of \$3,000,000.00 to in excess of \$7,000,000.00. The decision and reasons of the court found there was a breach of contract by Devco. However, damages were only awarded in the amount of \$10,000.00. Roper was substantially unsuccessful in its claim for damages on the findings that had Devco not breached its contract it was unlikely Roper would have been able, having regard to its lack of performance to the date of its termination, to have carried out its obligations under the contract. Additionally, on the evidence, it was clear that even had Devco performed in accordance with its obligations under the contract, Roper would have lost money and therefore the termination by Devco had not caused any financial loss to Roper. Roper was losing money under the contract and on the evidence, even had Devco provided the quantities of

material to which it had obligated itself under the contract, Roper would have continued to lose money and therefore there was no financial loss arising as a result of the termination by Devco.

- [16] In noting *Civil Procedure Rule 63.03(1)* provides that unless the court otherwise orders, costs of a proceeding or of any issue of fact or law therein shall follow the event, Devco references the decision of the Court of Appeal in *Griffin v. Corcoran* (2001), 193 N.S.R. (2d) 279, where Cromwell, J.A., for the court, at para. 82, stated:

The general rule that costs follow the event also applies to counterclaims. However, for costs purposes, the counterclaim should be treated as a separate proceeding and, generally, the costs of the counterclaim should relate only to the amount by which the costs of the proceedings are increased as a result of the counterclaim.

- [17] Counsel says that having regard to the amount claimed by Roper, when compared to the amount awarded, the success, if any, was token and should merit an award of damages to Devco in resisting Roper's claim. Counsel observes that in *Griffin v. Corcoran*, *supra*, the claim had only involved a small portion of the trial and as the costs associated with bringing the counter-claim were negligible, no award was made, while on the other hand, in the present instance, a considerable amount of the evidence and time was expended by Devco in resisting the claim presented by Roper.
- [18] Counsel for Devco suggests the amount claimed should be the amount involved for purposes of applying costs, citing the decision of Associate Chief Justice Palmett, in *McManus v. Nova Scotia (Attorney General)* (1995), 147 N.S.R. (2d) 318, where he awarded costs based on \$100,000.00 "amount involved" even though, if successful, the plaintiff who had claimed damages in the range of \$100,000.00 would have only received an award of \$25,000.00. In this regard, counsel references the decision of then Justice Saunders of the Nova Scotia Supreme Court in *Fillier v. Merlin Estate* (1999), 181 N.S.R. (2d) 115, in noting risk and consequences to the parties were factors to be considered in determining the appropriate "amount involved".
- [19] On the other hand, counsel for Roper, in his submission, states Roper's claim involved two issues, namely, the issue of liability based on an alleged breach of contract and secondly, the claim for loss of profits. Counsel notes Roper was successful on the first issue by virtue of the finding Devco had fundamentally breached its contract by failing to provide tonnages "approximating" the estimates contained in the contractual documents. Counsel's brief continues:

Given that Roper was wholly successful in establishing a breach of contract on the part of Devco with respect to tonnages, and given that Devco was able to establish no loss of profit, it is respectfully submitted that success with respect to this claim for breach of contract was equally divided between the parties, and that each party should therefore bear their own costs with respect to this issue.

- [20] Counsel adds, in addition, that Roper, having been successful in obtaining an award of \$10,000.00 is entitled to costs on the basis of Tariff A, Scale 5 with respect to this

amount.

### **FINDINGS**

- [21] As earlier noted, I am satisfied Devco is entitled to costs based on Scale 4, on an amount involved of \$270,307.05, less 20%. The reduction, as noted, relates to various issues raised by counsel for Roper in respect to the late withdrawal or reduction in claims, as well as the issues of disclosure and abandonment of issues by Devco at the outset and throughout the trial proceeding.
- [22] Devco's claim for costs, in defending the claim by Roper, is not allowed. In denying Devco costs in defending the claim advanced by Roper, I have considered the fact Roper was successful in establishing a breach of contract on the part of Devco and the further circumstance that there was an award of damages, albeit, nominal, made in favor of Roper.
- [23] In respect to Roper's claim for costs based on the amount awarded on the counterclaim, this is not allowed, since having regard to the extent of the claim advanced, it represented only a nominal amount of the claim. As such, having regard to the discretion of the court, no costs are awarded to Roper.
- [24] In his written submission, counsel for Roper suggests the amount of \$3,757,000.00 is, in fact, in excess of the amount claimed in that it includes \$1,200,000.00 which effectively related to a claim in lieu of interest. This does not materially affect my reasons, nor conclusion, that this would not be an appropriate circumstance for the awarding of costs to Roper, notwithstanding he was successful in establishing damages in the amount of \$10,000.00.

### **PRE-JUDGMENT INTEREST**

- [25] Devco claims pre-judgement interest pursuant to *Section 41* of the *Judicature Act* and indicates it is prepared to accept the rate of interest suggested in the Roper expert's report, being 8% calculated on a simple basis. Counsel suggests that interest should be awarded from the date of the breach of contract, March 13, 1986, to the date of judgement on the basis it cannot be said that Devco was responsible for "undue delay" in bringing its claim. Counsel notes the Originating Notice (Action) was filed on September 10, 1986, but yet maintains there is no basis for the court to determine that Devco has been responsible for undue delay in bringing this matter to trial.
- [26] Counsel for Roper suggests fairness requires both parties to be treated the same in the sense, pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50, Roper would not have been entitled to claim interest preceding February 1, 1992. Similarly Devco should not be entitled to interest preceding that date.
- [27] Again, notwithstanding the apparent concession by counsel for Roper that Devco is entitled to interest from February 1, 1992, I am not satisfied, absent explanations from the parties, and in particular the successful party, as to the reason for the extraordinary time period from the date of these events to the date of the trial, that pre-judgement interest should be awarded for anything more than five years. Devco is therefore entitled to interest from March 13, 1986, to and including, March 12, 1991, at the simple rate of 8%.



J.

# VIA Rail Canada Inc. v. National Transportation Agency, [2001] 2 FC 25

Date: 2000-10-10

Docket: A-507-96

Parallel 2000 CanLII 16275 (FCA); 193 DLR (4th) 357; 26 Admin LR (3d) 1

citations:

URL: <http://canlii.ca/t/4kq4>

Citation: VIA Rail Canada Inc. v. National Transportation Agency, 2000 CanLII 16275 (FCA), [2001] 2 FC 25, <<http://canlii.ca/t/4kq4>> retrieved on 2014-01-11

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Reflex Related decisions, legislation cited and decisions cited

Record

A-507-96

**VIA Rail Canada Inc. (Applicant)**

v.

**National Transportation Agency and Jean Lemonde (Respondents)**

***Indexed as: VIA Rail Canada Inc.v. National Transportation Agency (C.A.)***

Court of Appeal, Linden, Sexton and Evans JJ.A.-- Toronto, September 25; Ottawa, October 10, 2000.

*Administrative law -- Judicial review -- Certiorari -- Appeal from National Transportation Agency's (NTA) decision VIA Rail's Special and Joint Passenger Tariff, s. 13-D, permitting free travel by attendant capable of assisting disabled persons to get on, off trains, undue obstacle to mobility of disabled persons -- National Transportation Act, 1987, s. 39 imposing duty to give reasons orally or in writing -- NTA's reasons inadequate -- Purposes of reasons reviewed -- Duty to give reasons fulfilled only if reasons adequate -- Adequacy depending on circumstances -- Decision maker required to set out findings of fact, principal evidence upon which based, address major issues, set out reasoning process, reflect consideration of main relevant factors -- Adequacy of NTA's reasons measured against whether provide VIA with sufficient guidance to formulate tariff, whether provide Court with sufficient insight into NTA's reasoning process -- NTA not providing adequate reasons for conclusion tariff obstacle, sufficient insight into reasoning process, factors considered in determining obstacle "undue".*

*Transportation -- Appeal from National Transportation Agency's (NTA) decision VIA Rail's Special and Joint Passenger Tariff, s. 13-D permitting free travel by attendant capable of assisting disabled persons to get on, off trains, undue obstacle to mobility of disabled persons -- Appeal allowed on ground NTA's reasons inadequate as to why tariff constituting obstacle, any obstacle provided by tariff undue -- Neither articulating definition of "obstacle" nor engaging in reasoned consideration of tariff provisions -- Not answering how requirement attendant be capable of assisting disabled person to board, disembark train constituting obstacle -- Proper approach to determining whether something undue contextual -- Must be defined in light of aim of relevant enactment -- Reasons should have considered aim of National Transportation Act, 1987, in s. 3, providing transportation network should be economic, efficient, viable, effective -- Network must serve needs of all travellers -- Possibility of inconsistent needs contemplated by use of "so far as practicable" when requiring carrier to conduct business under conditions not constituting undue obstacle to mobility of disabled persons -- NTA to undertake balancing of interests -- As reasons not mentioning s. 3, Court concluding section ignored by NTA -- NTA erred in law by not considering, balancing all relevant factors.*

This was an appeal from the National Transportation Agency's 1995 decision that VIA Rail's Special and Joint Passenger Tariff 1, section 13-D constituted an undue obstacle to the mobility of persons with disabilities. Section 13-D provides that an attendant who is capable of assisting a disabled person to get on and off trains and of attending to his/her personal needs throughout the trip is entitled to travel for free. Upon investigation of a complaint, the Agency concluded in 1994 that certain actions and practices of VIA constituted obstacles to the mobility of persons with disabilities, and that those obstacles were undue because they could have easily been avoided by the carrier. The Agency found that the provision of assistance during boarding and disembarking is the carrier's responsibility. Following receipt of VIA's submissions, the Agency issued a decision in 1995 that requiring the attendant to be capable of assisting the disabled person to get on or off trains was an undue obstacle to the mobility of persons with disabilities.

*National Transportation Agency General Rules*, section 39 imposes a duty to give reasons orally or in writing. The Agency provided written reasons.

The issues were: whether the Agency erred in law by failing to articulate adequate reasons for its finding (1) that section 13-D of the tariff constituted an obstacle to the mobility of disabled persons; and (2) that such obstacle was "undue".

*Held*, the appeal should be allowed.

Reasons serve a number of beneficial purposes. They focus the decision maker on the relevant factors and evidence, provide the parties with the assurance that their representations have been considered, allow the parties to effectuate any right of appeal or judicial review, and in the case of a regulated industry, provide guidance to others who are subject to the regulator's jurisdiction. The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons will depend upon the circumstances of each case. Generally, to satisfy the obligation to provide adequate reasons, the decision maker must set out its findings of fact, the principal evidence upon which those findings were based, address the major points in issue, set out the reasoning process, and reflect consideration of

the main relevant factors. The adequacy of the Agency's reasons must be measured with particular reference to the extent to which they provided VIA with sufficient guidance to formulate its tariff without running afoul of the Agency, and to which they gave effect to VIA's right of appeal by providing the Court with sufficient insight into the Agency's reasoning process and the factors that it considered. For the Agency's reasons to be considered adequate, they must set out the basis upon which the Agency found that the existence of the tariff constituted an obstacle, that they reflected the reasoning process by which the Agency determined that the obstacle was undue and include a consideration of the main factors relevant to such a determination.

(1) The Agency erred in law by failing to provide adequate reasons for its conclusion that the tariff was an obstacle. It neither articulated any definition of "obstacle" nor engaged in any reasoned consideration of the tariff provisions. In not answering how the requirement that an attendant be capable of assisting the disabled person with whom they are travelling to board and disembark a train constitutes an obstacle to the mobility of the disabled person, it erred in law. There were also a number of inconsistencies on the face of the reasons that supported this conclusion. In particular, the Agency failed to explain why the attendant's obligation to assist the disabled passenger in getting to the washroom does not amount to an obstacle while assisting in train boarding does.

(2) The Agency also erred in law by failing to provide sufficient insight into the reasoning process that it followed or the factors that it considered in determining that any obstacle provided by the tariff was undue. The Courts have considered the use and interpretation of "undue" in other legislative contexts and clearly "undue-ness" is a relative concept. The proper approach to determining if something is "undue" is contextual -- "undue-ness" must be defined in light of the aim of the relevant enactment. It may also be useful to assess the consequences or effect if the undue thing is allowed to remain in place. The Agency's reasons included no definition of "undue" or any indication of a "rule or standard defining what is 'undue'". If the definition applied was that the obstacles were undue because they could have easily been avoided by the carrier, the Agency undertook no contextual analysis of the issue, but looked only to its perception of VIA's ability to avoid the obstacle. This was not sufficient. In determining whether the obstacle was undue the Agency should have first considered the aim of the *National Transportation Act, 1987* in subsection 3(1), which provides that the nation's transportation network should be, *inter alia*, economic, efficient, viable and effective. The network must serve the needs of all travellers, including those with disabilities. The possibility that the economic and commercial objectives of the Act, the needs of non-disabled passengers and those of disabled passengers, might be inconsistent in some circumstances was contemplated by Parliament and addressed by paragraph 3(1)(g) which provides that each carrier, so far as practicable, should conduct its business under conditions which do not constitute an undue obstacle to the mobility of disabled persons. The use of "so far as practicable", in addition to the use of the term "undue" provides further support for the view that the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest. The Agency having made no mention of section 3 in its decision, the Court had to conclude that it had no regard to that section. Nor do the reasons indicate that the Agency engaged in any consideration of the impact upon VIA and all of its passengers of leaving the tariff in place as compared to removing it. The Agency was required to consider all of the relevant factors and to balance each against the other. It did refer to some of the factors

impacting upon VIA's operational requirements and its commercial viability, but rather than dealing with those submissions in a reasoned manner, it simply expressed the belief that with sufficient advance notice and consultation between VIA and disabled passengers, problems of accessibility could be avoided.

statutes and regulations judicially considered

[Competition Act, R.S.C., 1985, c. C-34](#) (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19).

[Criminal Code, R.S.C., 1985, c. C-46](#).

*Lord's Day Act*, R.S.C. 1970, c. L-13.

*National Transportation Act*, 1987, R.S.C., 1985 (3rd Supp.), c. 28, ss. 3(1) (as am. by S.C. 1992, c. 21, s. 33), 22(1)(b), 63.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 19, s. 2), 63.3 (as enacted *idem*).

*National Transportation Agency General Rules*, SOR/88-23, s. 39.

cases judicially considered

applied:

*Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957 CanLII 11 \(SCC\)](#), [1957] S.C.R. 403; (1957), 8 D.L.R. (2d) 449; 118 C.C.C. 321; 29 C.P.R. 6; 26 C.R. 1.

considered:

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

referred to:

*Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1978 CanLII 17 \(SCC\)](#), [1979] 1 S.C.R. 684; (1978), 12 A.R. 449; 89 D.L.R. (3d) 161; 7 Alta. L.R. (2d) 370; 23 N.R. 565; *Desai v. Brantford General Hospital; Desai v. St. Joseph's Hospital* [reflex](#), (1991), 87 D.L.R. (4th) 140; 13 Admin. L.R. (2d) 312; 52 O.A.C. 221 (Ont. Div. Ct.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000 CanLII 17101 \(FCA\)](#), [2000] 2 F.C. 592; (2000), 18 Admin. L.R. (3d) 159; 5 Imm. L.R. (3d) 1; 252 N.R. 1 (C.A.); *Weidman v. Shragge* [1912 CanLII 58 \(SCC\)](#), (1912), 46 S.C.R. 1; *R. v. Nova Scotia Pharmaceutical Society*, [1992 CanLII 72 \(SCC\)](#), [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241; *Aetna Insurance Co. et al. v. The Queen*, [1977 CanLII 174 \(SCC\)](#), [1978] 1 S.C.R. 731; (1977), 20 N.S.R. (2d) 565; 75 D.L.R. (3d) 332; 34 C.C.C. (2d) 157; 30 C.P.R. (2d) 193; 15 N.R. 117; *Container Materials Ltd. et al. v. The King*, [1942 CanLII 1 \(SCC\)](#), [1942] S.C.R. 147; [1942] 1 D.L.R. 529; (1942), 77 C.C.C. 129; *Minister of Transportation & Communications (Ont.) v. Reimer Express Lines Ltd.*, [1974] 2 F.C. 164; (1974), 52 D.L.R. (3d) 473; 7 N.R. 32 (C.A.); *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990 CanLII 76 \(SCC\)](#), [1990] 2 S.C.R. 489; (1990), 111 A.R. 241; 72 D.L.R. (4th) 417; [1990] 6 W.W.R. 193; 76 Alta. L.R. (2d) 97; 12 C.H.R.R. D/417; 90 CLLC 17,025; 113 N.R. 161.

authors cited

*Concise Oxford Dictionary of Current English*, 7th ed. Oxford: Clarendon Press, 1983, "obstacle".

Evans, J. M. *Administrative Law: Cases, Text and Materials*, 4th ed. Toronto: Emond Montgomery, 1995.

APPEAL from the National Transportation Agency's decision that VIA Rail's Special and Joint Passenger Tariff, section 13-D constituted an undue obstacle to the mobility of persons with disabilities (*In the matter of an application by Mr. Lemonde, on behalf of Minikami (Club de mini Basket-ball en fauteuil roulant "Les Kamikazes")*, pursuant to subsection 63.3(1) of the National Transportation Act, 1987, [R.S.C., 1985, c. 28](#) (3rd Supp.), Order No. 1995-R-491; decision No. 791-R-1995, dated November 28, 1995). Appeal allowed on the ground that the Agency's reasons were inadequate, both as to the basis on which the tariff constituted an obstacle, and as to the reasoning process for determining that any obstacle provided by the tariff was undue.

appearances:

*John A. Campion and Yvonne B. Chisholm* for applicant.

*Elizabeth C. Barker* for respondent.

solicitors of record:

*Fasken Campbell Godfrey*, Toronto, for applicant.

*Canadian Transportation Agency*, Hull, Quebec for respondent.

*The following are the reasons for judgment rendered in English by*

[1]Sexton J.A.: This is an appeal from a decision<sup>1</sup> of the National Transportation Agency (the Agency) dated November 28, 1995 that held that a portion of VIA Rail's Special and Joint Passenger Tariff (the tariff) constitutes an undue obstacle to the mobility of persons with disabilities.

### Facts

[2]In December 1993, a team of wheelchair basketball athletes travelled from Saint-Hyacinthe to Toronto using VIA Rail. Eight members of the group were physically disabled persons travelling in wheelchairs. Each was accompanied by an attendant to assist them with their basic needs during the trip. In accordance with the provisions of the tariff, the attendants travelled for free. The group encountered a number of difficulties related to the accessibility of VIA's services to the disabled passengers.

[3]Upon application by Mr. Jean Lemonde, the party's leader for the trip, the Agency conducted an investigation into a number of specific complaints. The Agency concluded that certain actions and practices of VIA constituted obstacles to the mobility of the persons with disabilities in the party and that those obstacles "were undue because they could have easily been avoided by the carrier." In a decision communicated by letter dated November 4, 1994, it ordered VIA to take a number of corrective measures. VIA subsequently complied with those orders to the satisfaction of the Agency.<sup>2</sup>

[4]In the same November, 1994 decision, the Agency called attention to section 13-D of VIA's Special and Joint Passenger Tariff 1, NTA 1, the relevant portions of which are reproduced below:

## Section 13-D DISABLED PERSON AND ATTENDANT

### 1. CONDITIONS

A ticket may be sold for the transportation of a disabled person and one adult attendant (at the fare authorized in 3) upon [a list of conditions follows]

...

The attendant must be capable of assisting the disabled person to get on and off trains and of attending to his/her personal needs throughout the trip.

...

### 3. FARE BASIS

One fare (any fare which the disabled person would pay if travelling alone) will apply for the transportation of both passengers.

[5]Thus, the tariff provides that an attendant who is capable of providing assistance to a disabled person who is unable to travel alone is entitled to travel for free.

[6]With respect to the provisions of the tariff, the Agency made the following statements:

The Agency specifies that the presence of an attendant is no excuse not to provide assistance to a person during boarding and deboarding.

The Agency supports the principle pursuant to which the attendant must be capable of meeting the basic needs of the person s/he is accompanying and of offering the services which are not usually offered by a carrier. However, providing assistance during boarding and deboarding is the carrier's responsibility. Consequently, this assistance should not be imposed on the attendant. The obligation imposed on the latter to board and deboard a disabled person constitutes an obstacle to the mobility of the person and the Agency believes that disabled persons are entitled to receive the same level of service whether they are travelling alone or with an escort.

[7]As a result of this finding, the Agency required VIA to show cause that the Agency should not find the obstacle "undue" and order VIA to remove the requirement from its tariff.

### Decision Appealed From

[8]Following the receipt of VIA's submissions, the Agency issued a further order and decision on November 28, 1995. It ordered that the words "The attendant must be capable of assisting the disabled person to get on and off trains" be struck from the tariff and that a provision be added to clearly indicate VIA's responsibility to board and deboard all of its passengers. It indicated that VIA could add to the amended tariff a *proviso* allowing it to inquire, at the time of booking, whether the passenger's attendant would be able to assist VIA personnel, if necessary. It also ordered VIA to issue a bulletin to its employees informing them of the changes and to make consequential amendments to various printed materials.

[9]The Agency's main finding with respect to the tariff was reported as follows:

The Agency remains of the opinion that it is the responsibility of VIA to board and deboard its passengers. Under normal conditions and with sufficient advance notice, the carrier should be in a position to control the quality and level of services--both personnel and equipment--to accommodate the boarding and deboarding needs of passengers with disabilities. As a general principle, attendants are there to provide assistance of a personal nature to the person during the trip. To put the onus on the attendant that "the attendant must be capable of assisting the disabled person to get on or off trains. . ." as found in VIA's Special Local and Joint Passenger tariff, is an undue obstacle to the mobility of persons with disabilities.

[10]This Court granted VIA Rail leave to appeal the decision by order dated June 3, 1996. The Agency opposes the appeal. The initial complainant, Mr. Lemonde, did not appear.

### Relevant Legislation

[11]The legislation relevant to this appeal is found in the *National Transportation Act, 1987* [hereinafter NTA]:<sup>3</sup>

**3. (1)** It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

...

(g) each carrier or mode of transportation, so far as practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

...

(ii) an undue obstacle to the mobility of persons, including those persons who are disabled, [Emphasis added.]

...

**63.3 (1)** The Agency may, of its own motion or on application, inquire into a matter in relation to which a regulation could be made under subsection 63.1(1),<sup>4</sup> regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of disabled persons.

[12]Also relevant is the following provision of the *National Transportation Agency General Rules*:<sup>5</sup>



39. The Agency shall, in any proceeding where it does not grant the requested relief or where an opposition has been expressed, give orally or in writing the reasons for its order, decision, ruling, direction, leave, sanction or approval.

### Issues

[13]The written submissions of the parties were primarily directed toward the Agency's interpretation and use of the term "undue obstacle" and the standard of review. During oral argument, counsel for both parties agreed that the appropriate standard of review was reasonableness. As it is unnecessary for us to do so, I do not propose to consider this matter. Also during oral argument, it became clear that the adequacy of the Agency's reasons was a major issue. In particular, VIA argued that in determining whether or not an "undue obstacle" existed, the Agency was required to undertake a balancing of interests as between the disabled person and the carrier and that the Agency had failed to indicate in its reasons why it had struck the balance as it did.

[14]It is necessary, therefore, to deal with the questions of whether or not the Agency erred in law by failing to articulate adequate reasons for:

1. Its finding that section 13-D of the tariff constituted an obstacle to the mobility of disabled persons; and
2. Its finding that such obstacle is "undue".

[15]For the reasons which appear below, I believe that the reasons given by the Agency were inadequate.

### Analysis

#### The Duty to Give Reasons

[16]Although the Act itself imposes no duty on the Agency to give reasons, section 39 of the *National Transportation Agency General Rules* does impose such a duty. In this case, the Agency chose to provide its reasons in writing.

[17]The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.<sup>6</sup>

[18]Reasons also provide the parties with the assurance that their representations have been considered.

[19]In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker

erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

[20]Finally, in the case of a regulated industry, the regulator's reasons for making a particular decision provide guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured.

[21]The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."<sup>7</sup>

[22]The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.<sup>8</sup> Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based.<sup>9</sup> The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out<sup>10</sup> and must reflect consideration of the main relevant factors.<sup>11</sup>

[23]In my view, the general propositions stated above are all applicable in the circumstances of the case at bar. However, in this case, I believe that the adequacy of the Agency's reasons must be measured with particular reference to the extent to which they provide VIA with sufficient guidance to formulate their tariff without running afoul of the Agency and to the extent to which they give effect to VIA's right of appeal by providing this Court with sufficient insight into the Agency's reasoning process and the factors that it considered.

[24]Therefore, I believe that for this Court to hold that the Agency's reasons are adequate, we must find that those reasons set out the basis upon which the Agency found that the existence of the tariff constituted an obstacle, that they reflect the reasoning process by which the Agency determined that the obstacle was undue and include a consideration of the main factors relevant to such a determination.

[25]I now turn to the questions posed above.

Issue 1: Did the Agency provide adequate reasons for its finding that section 13-D of the tariff constitutes an obstacle to the mobility of passengers with disabilities?

[26]In the words of the tariff, did the Agency's reasons provide sufficient indication of the reasoning process by which it determined that it is an obstacle to the mobility of a disabled passenger to require that an attendant, travelling on the same ticket as the passenger, be capable of assisting the passenger in getting on and off the train?

[27]The Agency determined that the tariff was an obstacle in its November 1994 decision. The decision under appeal treats this earlier finding as a given. The only portion of the 1994

decision dealing with the reasons for the Agency's determination is reproduced in paragraph 6 above. It is worth noting that the tariff was not a subject of the original complaint filed by Mr. Lemonde. Its provisions seem to have come before the Agency only as a result of VIA's reference to it in its submission responding to the complaint.

[28]In my view, the conclusion that the tariff was an obstacle is not supported by sufficient indication of the reasoning process engaged in by the Agency. The reasons provide no intimation of what constitutes an obstacle to the mobility of a disabled passenger nor are they sufficiently clear.

[29]The *Concise Oxford Dictionary of Current English*<sup>12</sup> defines "obstacle" as a "thing that obstructs progress". Not only has the Agency failed to articulate any definition but it also does not appear to have engaged in any reasoned consideration of the tariff provisions. How does the requirement that an attendant be capable of assisting the disabled person with whom they are travelling to board and deboard a train constitute an obstacle to the mobility of the disabled person? This is a question which the Agency did not answer and hence it erred in law.

[30]There are a number of other inconsistencies on the face of the reasons that provide support for my view that the reasons with respect to the finding that the tariff was an obstacle were inadequate. In both its 1994 and 1995 decisions, the Agency accepted that an attendant must be capable of meeting the basic needs of the person he or she is accompanying and of offering services which are not usually offered by the carrier. One example of this would be in assisting the disabled passenger to travel to and from the washroom. Presumably, therefore, the attendant would be required to be capable of providing such assistance. This activity, like boarding or deboarding a train, involves physically assisting the disabled person in moving from one place to another and potentially into and out of a wheelchair. The Agency does not explain why the obligation of the attendant in respect of personal needs on board the train does not constitute an obstacle while any obligation in respect of being capable of providing help in boarding or deboarding does.

[31]Another inconsistency is apparent in relation to an error made by the Agency in describing the condition imposed by the tariff. In the 1994 decision, it said: "The obligation imposed on the [attendant] to board and deboard a disabled person constitutes an obstacle to the mobility of the person." This is not the obligation imposed by the tariff. The tariff merely provides that the attendant be capable of providing such assistance. While it implies the possibility that an attendant might be requested by VIA to provide physical assistance in boarding and deboarding disabled passengers, the condition does not impose a general obligation that the attendant do so in all circumstances. Indeed, the Agency accepted in its 1995 decision that, in general, VIA did provide such assistance to disabled passengers.

[32]The Agency did use the proper wording when requiring VIA to show cause why the condition should not be removed and again in its 1995 decision. However, both of these references were made in contexts that arose after the Agency had reached the conclusion that the tariff was an obstacle.

[33]I conclude, therefore, that the Agency erred in law by failing to provide adequate reasons for its decision that the tariff was an obstacle. Its reasons did not provide sufficient insight into the reasoning process followed. Moreover, they were not sufficiently clear with respect to the

conclusion that is in issue.

Issue 2: Did the Agency err in law by failing to provide adequate reasons for its conclusion that any obstacle posed by the tariff was "undue"?

[34]While there seems to be no jurisprudence dealing with what constitutes an undue obstacle to the mobility of disabled persons, the Courts have had ample opportunity to consider the use and interpretation of the term "undue" in other legislative contexts.<sup>13</sup>

[35]While "undue" is a word of common usage which does not have a precise technical meaning the Supreme Court has variously defined "undue" to mean "improper, inordinate, excessive or oppressive"<sup>14</sup> or to express "a notion of seriousness or significance."<sup>15</sup> To this list of synonyms, the *Concise Oxford Dictionary of Current English* adds "disproportionate."

[36]What is clear from all of these terms is that "undueness" is a relative concept. I agree with the position expressed by Cartwright J, as he then was:

"Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.<sup>16</sup>

The proper approach to determining if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment.<sup>17</sup> It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.<sup>18</sup>

[37]The Supreme Court has also recognized that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religious beliefs up to the point of undue hardship, Wilson J., writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended to be exhaustive and the results which will be obtained from a balancing of these factors against the right of the employee to be free of discrimination will necessarily vary from case to case."<sup>19</sup>

[38]In the case at bar, the Agency's reasons do not reveal sufficient indicators of the reasoning process it followed in interpreting the term "undue". They include no definition of the term "undue" or any indication of a "rule or standard defining what is 'due'." In its submissions to this Court, the Agency argued that the definition that it had applied was that articulated in its November 1994 reasons: "the obstacles . . . were undue because they could have easily been avoided by the carrier." Even if this could be said to be true, the statement can only lead me to conclude that the Agency undertook no contextual analysis of the issue. It looked only to its perception of VIA's ability to avoid the obstacle. In my opinion, this was not sufficient.

[39]In determining whether the obstacle was undue, the Agency should have first considered the aim of the *National Transportation Act, 1987*. This is found in section 3(1), which provides that the nation's transportation network should be, *inter alia*, economic, efficient,

viable and effective. The network must serve the needs of all travellers, including those with disabilities. In my opinion, the possibility that the economic and commercial objectives of the Act, the needs of non-disabled passengers and those of disabled passengers might be inconsistent in some circumstances was contemplated by Parliament and addressed by paragraph 3(1)(g). This provision provides that each carrier, so far as practicable, should conduct its business under conditions which do not constitute an undue obstacle to the mobility of disabled persons. The use of the words "so far as practicable", in addition to the use of the term "undue" provides further support for my view that the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest.

[40]In its decision the Agency made no mention of section 3 of the Act. I am forced to conclude that it did not have regard to it. Nor do the reasons indicate that the Agency engaged in any consideration of the impact upon VIA and all of its passengers of leaving the tariff in place as compared to removing it.

[41]The Agency was required to consider all of the relevant factors and to balance them against each other. With respect to the interests of the disabled passengers the following factors might be relevant:

1. The difficulty of providing an escort who is capable of assisting the disabled person in boarding the train;
2. The difficulty of providing an escort who is willing to assist the disabled person in boarding the train;
3. The importance to the dignity of the individual that they be able to travel with as much independence as possible and their right to accessible travel.

[42]With respect to VIA, the relevant factors may be collectively termed operational factors and commercial or economic factors. They might include the following:

1. The reasonable availability of personnel and equipment to assist in the boarding and disembarkation from train;
2. The time required for providing assistance in boarding and deboarding;
3. The effect on scheduling of trains which are required to spend time boarding disabled persons in excess of that scheduled;
4. The impact of delays incurred as a result of boarding disabled persons on all passengers;
5. The impact of unscheduled delays on passenger confidence and the continued viability of VIA's passenger rail service;
6. VIA's ability to contract occasional workers to assist in boarding and deboarding, having regard to any collective bargaining agreements to which VIA is a party;
7. The requirement that such occasional workers be properly trained and insured to carry out

their duties; and

8. The expense of providing additional personnel for boarding disabled persons, especially at a small station where only a modest complement of staff is available.

[43]I note that the Agency did refer to some of the factors impacting upon VIA's operational requirements and its commercial viability. It did so mainly in the context of simply reciting VIA's submissions. The Agency agreed with VIA's position that it had an obligation to provide a timely and effective service to all of its passengers and accepted that, in general, VIA does provide assistance in boarding and debarking to all of its passengers, whether disabled or not. It also recognized that scheduling constraints, large numbers of disabled passengers and insufficient personnel at some stations might impact upon VIA's ability to provide services to disabled passengers. Unfortunately, rather than dealing with those submissions in a reasoned manner, it simply expressed the belief that with sufficient advance notice and consultation between VIA and disabled passengers, problems of accessibility could be avoided.

[44]In summary, the Agency failed to provide sufficient insight into the reasoning process that it followed or the factors that it considered in determining that any obstacle provided by the tariff was undue. In so doing, it erred in law.

### Conclusion

[45]In my opinion, the reasons provided by the Agency in its 1994 and 1995 decisions with respect to whether the tariff constituted an undue obstacle to the mobility of disabled persons were inadequate. Specifically, they fail to provide sufficient indication of the reasoning process which the Agency might have followed or of what factors the Agency might have considered relevant.

[46]The decision of the National Transportation Agency with respect to section 13-D of the tariff is set aside. The matter is referred back to a differently constituted panel of the Agency to conduct a new inquiry with respect to the tariff in accordance with these reasons. The Agency is required to provide the parties an opportunity to lead evidence and make submissions on the issue.

Linden J.A.: I agree.

Evans J.A.: I agree.

<sup>1</sup> Order No. 1995-R-491; decision No. 791-R-1995. Orders and decisions of the Agency are available at the Canadian Transportation Agency's website, online: < <http://www.cta-otc.gc.ca/eng/toc.htm> > .

<sup>2</sup> *Ibid.*

<sup>3</sup> R.S.C., 1985 (3rd Supp.), c. 28 [ss. 3(1) (as am. by S.C. 1992, c. 21, s. 33), 63.3 (as enacted by R.S.C., 1985 (4th Supp.), c. 19, s. 2)].

<sup>4</sup> The matters falling under s. 63.1(1) [as enacted *idem*] include:

**63.1** (1) . . .

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of disabled persons or services incidental thereto;

<sup>5</sup> SOR/88-23. The rules are made pursuant to s. 22(1)(b) of the NTA which provides:

**22.** (1) The Agency may, with the approval of the Governor in Council, make rules respecting

. . .

(b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which *in camera* hearings may be held;

<sup>6</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, at p. 845.

<sup>7</sup> J. M. Evans, *Administrative Law: Cases, Text and Materials* (4th ed.), (Toronto: Emond Montgomery, 1995), at p. 507.

<sup>8</sup> *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1978 CanLII 17 \(SCC\)](#), [1979] 1 S.C.R. 684, at p. 706.

<sup>9</sup> *Desai v. Brantford General Hospital; Desai v. St. Joseph's Hospital* [reflex](#), (1991), 87 D.L.R. (4th) 140, (Ont. Div. Ct.), at p. 148.

<sup>10</sup> *Supra*, note 8, at p. 707.

<sup>11</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000 CanLII 17101 \(FCA\)](#), [2000] 2 F.C. 592 (C.A.), at pp. 637, 687-688.

<sup>12</sup> (7th ed.) (Oxford: Clarendon Press, 1983).

<sup>13</sup> These include undue prevention or lessening of competition (*Combines Act*, now the [Competition Act \[R.S.C., 1985, c. C-34\]](#) (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)), undue exploitation of sex (the [Criminal Code \[R.S.C., 1985, c. C-46\]](#)), undue delay in movement of freight (*Lord's Day Act* [R.S.C. 1970, c. L-13]) and undue hardship (human rights legislation).

<sup>14</sup> *Weidman v. Shragge* [1912 CanLII 58 \(SCC\)](#), (1912), 46 S.C.R. 1, at pp. 42-43.

<sup>15</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992 CanLII 72 \(SCC\)](#), [1992] 2 S.C.R. 606, at p. 647.

<sup>16</sup> *Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957 CanLII 11 \(SCC\)](#), [1957] S.C.R. 403, at p. 425. The statement was made in the context of minority, concurring reasons but was approved of by the majority in *Aetna Insurance Co. et al. v. The Queen*, [1977 CanLII 174 \(SCC\)](#), [1978] 1 S.C.R. 731, at p. 746.

<sup>17</sup> *Container Materials Ltd. et al. v. The King*, [1942 CanLII 1 \(SCC\)](#), [1942] S.C.R. 147, at p. 152 *per* Duff C.J. The judgment of the majority expressed the same principle in other words. See *Howard Smith Paper Mills Ltd*, *supra*, note 16, *per* Kellock J (for the majority), at p. 409.

<sup>18</sup> *Aetna Insurance Co.*, *supra*, note 16, at pp. 747-748. *Minister of Transportation & Communications (Ont.) v. Reimer Express Lines Ltd.*, [1974] 2 F.C. 164 (C.A.).

<sup>19</sup> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990 CanLII 76 \(SCC\)](#), [1990] 2 S.C.R. 489, at p. 521.

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by  for the  Federation of Law Societies of Canada



Date: 20071026

Docket: T-484-06

Citation: 2007 FC 1112

**BETWEEN:**

**BANK OF THE WEST.  
A body corporate, having its head office at  
Walnut Creek, California, USA**

**Plaintiff**

**and**

**THE 26' WELL CRAFT SCARAB SHIP  
"WELDGA281596 and DARRIN GOODALL, and  
LLOYD'S UNDERWRITERS, and THE OWNERS and  
ALL OTHERS INTERESTED IN  
THE SHIP "WELDGA281596**

**Defendants**

**REASONS FOR ORDER**

**MACTAVISH J.**

[1] This is an appeal from an order of a Prothonotary denying leave to the defendant insurer to amend its statement of defence to plead a limitation period contained in a policy of marine insurance.

[2] At the conclusion of the hearing of the appeal, I advised counsel that the appeal would be allowed. These are my reasons for that decision.

### Standard of Review

[3] Insofar as the standard of review with respect to the merits of the Prothonotary's decision is concerned, where a discretionary order of a Prothonotary is vital to the final issue in a case, the decision should be reviewed on a *de novo* basis: see *Merck & Co. Inc. v. Apotex*, [2003] F.C.J. No. 1925, 2003 FCA 488 at ¶18-19.

[4] However, where the decision under review is not vital to the final issue in the case, it ought not to be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck*, at ¶19.

[5] As to what sort of questions are vital to the final issues in a case, *Merck* teaches that the test is a stringent one. Examples of issues that would be considered to be vital were cited by Justice Reed in *James River Corp. of Virginia v. Hallmark Cards, Inc.* (1997), 72 C.P.R. (3d) 157 (F.C.T.D.). This list included a decision not to allow an amendment to pleadings [at page 160].

[6] In this case, the proposed amendment adds an entirely new defence, which goes directly to the ultimate issue in this case, which is the liability of the defendant insurer to the plaintiff under the insurance policy. As a consequence, I am of the view that the decision of the Prothonotary should be reviewed on a *de novo* basis.

[7] In any event, the failure of the Prothonotary to give any reasons for his decision further dictates that I exercise my discretion *de novo*. While a lack of reasons alone does not automatically give rise to a hearing *de novo* on an appeal from a Prothonotary's decision (see *Anchor Brewing Co. v. Sleeman Brewing & Malting Co.*, 2001 FCT 1066), in this case, I am unable to ascertain from the record before me whether the Prothonotary acted on a wrong principle or a misapprehension of the facts.

[8] Finally, I am mindful of the fact that the Prothonotary was acting in his capacity as case manager in rendering the decision in issue, which would ordinarily lead to greater deference being shown: see *Apotex Inc. v. Merck & Co.*, 2007 FC 250. However, this is not a case where the Prothonotary has had a lengthy history managing the file, as he had only recently been appointed to manage this proceeding, and little had transpired on the file until he rendered the decision in question.

[9] As a consequence, I intend to consider the defendant insurer's motion for leave to amend on a *de novo* basis.

### Analysis

[10] In order to grant leave to amend the defendant insurer's Statement of Defence, the Court must first be satisfied that the proposed amendment raises a triable issue: see *Merck & Co. v. Apotex Inc.*, previously cited, at ¶39. In this case, it is conceded that the proposed limitation defence does indeed raise a triable issue.

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# Infonet Services Corp. v. Matrox Electronic Systems Ltd., 2004 FCA 162 (CanLII)

Date: 2004-04-21

Docket: A-103-04

URL: <http://canlii.ca/t/1h1xl>

Citation: Infonet Services Corp. v. Matrox Electronic Systems Ltd., 2004 FCA 162 (CanLII),  
<<http://canlii.ca/t/1h1xl>> retrieved on 2014-01-11

Noteup: Search for decisions citing this decision

Reflex Related decisions, legislation cited and decisions cited

Record

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Date: 20040421

Docket: A-103-04

Citation: 2004 FCA 162

CORAM: STONE J.A.

**SEXTON J.A.**

**EVANS J.A.**

BETWEEN:

INFONET SERVICES CORPORATION

Appellant

and

MATROX ELECTRONIC SYSTEMS LTD., MATROX, INC., MATROX

GRAPHICS INC., MATROX VIDEO LTD., MATROX IMAGING LTD., CAPITAL

NETWORKS LIMITED AND DIGIMATION INCORPORATED

Respondents

Heard at Ottawa, Ontario, on April 21, 2004.

Judgment delivered from the bench at Ottawa, Ontario, on April 21, 2004.

REASONS FOR JUDGMENT OF THE COURT BY:  
STONE J.A.

Date: 20040421

Docket: A-103-04

Citation: 2004 FCA 162

CORAM: STONE J.A.

**SEXTON J.A.**

**EVANS J.A.**

BETWEEN:

INFONET SERVICES CORPORATION

Appellant

and

MATROX ELECTRONIC SYSTEMS LTD., MATROX, INC., MATROX  
GRAPHICS INC., MATROX VIDEO LTD., MATROX IMAGING LTD., CAPITAL  
NETWORKS LIMITED AND DIGIMATION INCORPORATED

Respondents

**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Ottawa, Ontario on April 21, 2004)

**STONE J.A.**

[1] This unopposed appeal is from an order of the Federal Court dated January 28, 2004. By that order the Court dismissed the appellant's action for failure to show cause why the action should not be dismissed for delay. The order reads in part: "This action be and it is

hereby dismissed for delay". No reasons for the order were given by the Motions Judge.

[2] The action, for trade-mark infringement, was commenced by Statement of Claim filed in early December 2002. The Statement of Defence and the Counterclaim were filed in late January 2003. The plaintiff's Defence to the Counterclaim was filed near the end of February of the same year. On April 23, 2003, the parties exchanged affidavits of documents and in June they agreed to consider the possibility of settling the dispute. It was not, however, until December 16, 2003 that the first formal settlement negotiations took place. Between October 23, 2003 and December 16, 2003 the parties were able to conclude a non-disclosure agreement which enabled them to exchange relevant information while attempting to settle the dispute. As the parties were unable to reach agreement on December 16, 2003, they scheduled a further meeting to continue their negotiations on January 14, 2004.

[3] On December 18, 2003, the Administrator issued the Notice of Status Review pursuant to rule 381. That notice required the appellant to show cause by written submissions to be filed on or before January 19, 2004 why the action should not be dismissed for delay. It also recited that more than 360 days had elapsed since the filing of the Statement of Claim and that no requisition for a pre-trial conference had been filed. The appellant served and filed written submissions January 5, 2004. In those submissions the appellant summarized the steps that had been taken by the parties with respect to pleadings and discovery of documents as well as the attempts that were underway between the parties to conclude a settlement, all as outlined above. The appellant then proposed the following plan of action in paragraph 7 of the submissions:

The parties have made and are continuing to make a good faith attempt to resolve the matters in dispute. In the event that a settlement cannot be reached in the action, following a concerted effort, the plaintiff intends to proceed with the action and to schedule examinations for discovery of the defendants.

[4] Rule 380 authorizes the Court to fix the time and place for a status review in the circumstances therein described which includes the fact that "360 days have elapsed since the issuance of the statement of claim and no party has filed a requisition for a pre-trial conference under rule 258". Rule 382 confers a broad discretionary power on the judge or prothonotary who conducts the review. The rule enables the Court to dismiss the proceeding for delay, or allow it to proceed and to couple the permission with an order that the proceeding continue "as a specially managed proceeding".

[5] In *Baroud v. Canada* [1998 CanLII 8819 \(FC\)](#), (1998), 160 F.T.R. 91 (T.D.), at paragraphs 4 and 5, Hugessen J. proposed the following two-part test to be applied in exercising the discretion under rule 382:

In deciding in what manner to exercise the wide discretion granted to it by rule 382 at the conclusion of a status review, it seems to me that the court needs to be concerned primarily with two questions:

1) what are the reasons why the case has not moved forward faster and do they justify the delay that has occurred?; and

2) what steps is the plaintiff now proposing to move the matter forward?

The two questions are clearly interrelated in that if there is a good excuse for the case not having progressed more quickly, the court is not likely to be very exigent in requiring an action plan from the plaintiff. On the other hand, if no good reason is advanced to justify the delay, the plaintiff should be prepared to demonstrate that he recognizes that he has a responsibility to the court to move his action along. Mere declarations of good intent and of the desire to proceed are clearly not enough.

[6] We are of the view that the lack of reasons for the January 28, 2004 order dismissing the action for delay renders it impossible for this Court to carry out a proper review of that order with a view to determining whether the *Baroud* test was faithfully applied. As we have seen, written submissions in response to the Notice of Status Review were before the Motions Judge. Yet the appellant's explanations for the delay and its proposed plan of action were not explicitly addressed. In these circumstances, we are of the view that intervention by this Court is justified and that the Court should exercise the rule 382 discretion *de novo* by giving the judgment that the Federal Court should have given: see *Grenier v. Canada*, [2001] F.C.J. No. 147 (Court file No. A-474-00) (C.A.).

[7] The appellant contends that it was acting within the spirit of rule 257 after the close of pleadings by entering into settlement discussions and, indeed, that rule 258 contemplates the completion of such discussions before a requisition for a pre-trial conference can be presented with a view to advancing the action towards trial. In the present case, once the pleadings were closed, the appellant ought to have attempted to schedule the respondents' examinations for discovery pursuant to rule 236. Nothing prevented the appellant from doing so despite the parties' focus on a possible out-of-court settlement. The appellant did set forth an action plan in its written submissions to the Motions Judge. That plan is somewhat vague in that it contains no specific deadlines for concluding the negotiations or for commencing examinations for discovery. At the same time the plan is not entirely spurious, and in our view it represents a recognition on the part of the appellant of its responsibility to move the action along and a sincere commitment to do so. It is clear from the record that the delay here in issue extended over a period of 8 months or less and that while no steps under the *Rules* were taken during that period to advance the action towards trial the parties attempted to and did engage in good faith negotiations with a view to settling the dispute as, by the *Rules*, they were obliged to do. Moreover, the action itself was not long outstanding having been commenced less than 14 months before it was dismissed on January 28, 2004. This Court is content to allow the action to continue but only on the basis that if a requisition for a pre-trial conference is not filed on or before September 1, 2004, the Administrator shall serve a further Notice of Status Review pursuant to rule 381.

[8] In the result, the appeal will be allowed, the order of the Federal Court dated January 28, 2004 set aside and the action permitted to continue on the basis that if a

requisition for a pre-trial conference is not filed on or before September 1, 2004, the Administrator shall serve a further Notice of Status Review pursuant to rule 381.

"A.J. STONE"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-103-04

APPEAL FROM AN ORDER OF THE FEDERAL COURT OF CANADA DATED  
JANUARY 28, 2004, FEDERAL COURT OF CANADA FILE NO. T-2034-02

**STYLE OF CAUSE:** INFONET SERVICES  
CORPORATION v. MATROX ELECTRONIC SYSTEMS LTD. ET AL.

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** April 21, 2004

**REASONS FOR JUDGMENT OF THE COURT** (Stone, Sexton, Evans JJ.A.)

**RENDERED FROM THE BENCH BY:** Stone J.A.

**APPEARANCES:**

Ms. Barbara A. McIsaac, Q.C. for the Appellant

**SOLICITORS OF RECORD:**

McCarthy Tétrault LLP for the Appellant

Ottawa, Ontario

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